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2373
No. 12206

United States
Court of Appeals
for the Ninth Circuit

GEORGE T. GOGGIN, Receiver of the Estate of
Salsbury Motors, Inc.,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

United States
Court of Appeals
for the Ninth Circuit

GEORGE T. GOGGIN, Receiver of the Estate of
Salsbury Motors, Inc.,

Appellant,

VS.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

GENDEL & CHICHESTER,
810 James Oviatt Bldg.,
617 S. Olive St.,
Los Angeles 14, Calif.

For Appellee:

HUGH A. STEINMEYER,
G. L. BERREY,
JOHN E. WALTER,
R. H. FABIAN,
650 S. Spring St.,
Los Angeles 14, Calif. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
Southern District of California
Central Division

No. 45207-B

In Proceedings For An Arrangement.
In the Matter of SALSBUURY MOTORS, INC.,
a California corporation,

Debtor.

PETITION OF DEBTOR.

To the Honorable Judges of the District Court of
the United States, for the Southern District of
California, Central Division:

This petition of Salsbury Motors, Inc., a California corporation, hereinafter called "Debtor," having its principal place of business in the City of Pomona, County of Los Angeles, State of California, and engaged in the business of manufacturing and selling motor scooters, gasoline engines, in-plant trucks, and related products, respectfully represents:

I.

Debtor, a California corporation, has had its principal place of business in the County of Los Angeles, State of [2] California, within the above jurisdictional district for the six months immediately preceding the filing of this petition.

II.

No bankruptcy proceedings initiated by a petition by or against Debtor are now pending to the Debtor's knowledge and belief.

III.

Debtor is insolvent and proposes an arrangement with its creditors pursuant to the provisiosn of Chapter XI of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," as amended (hereinafter referred to as the "Bankruptcy Act").

The provisions of the arrangement proposed by Debtor are set forth in the Plan of Arrangement attached hereto marked Exhibit 1 and by this reference incorporated herein as though set forth in full.

IV.

The creditors affected by the Plan of Arrangement are divided into three classes: Bank of America National Trust and Savings Association as the holders of secured notes of the Debtor; Debtors unsecured creditors having claims in excess of \$500; and Northrop Aircraft, Inc. as the holder of unsecured notes of the Debtor.

V.

The schedule hereto annexed marked Schedule A and verified by the oath of Debtor's vice-president contains a full [3] and true statement of all its debts at June 30, 1947, and so far as it is possible to ascertain, the names and places of residence of its creditors and such other statements concerning said debts as are required by the provisions of the Bankruptcy Act. As soon as possible after the filing of this petition Debtor will file supplemental schedules bringing such schedules down to the date of filing of this petition.

VI.

The schedule hereto annexed, marked Schedule B, and verified by the oath of Debtor's vice-president, contains an accurate inventory of all its property, real and personal at June 30, 1947, and such further statements concerning said property as are required by the provisions of the Bankruptcy Act. As soon as possible after the filing of this petition Debtor will file supplemental schedules bringing such schedules down to the date of filing of this petition.

VII.

The schedule hereto annexed, marked Schedule C, sets forth a statement of the executory contracts of Debtor.

VIII.

The statement hereto annexed, marked Exhibit 2, and verified by the oath of the Debtor's vice-president, contains a full and true statement of its affairs as required by the provisions of the Bankruptcy Act.

IX.

That hereto annexed, marked Exhibit 3, certified by [4] as assistant secretary of the Debtor, is a full, true and correct copy of a resolution adopted by Debtor's Board of Directors on August 19, 1947, authorizing the filing of this petition.

X.

Debtor's creditor, Bank of America National Trust and Savings Association, shortly before the filing of this petition exercised its alleged right

of set-off and applied the money in Debtor's bank accounts with said bank to the indebtedness owing by Debtor to said bank represented by promissory notes of the Debtor aggregating approximately \$750,000 in principal amount, which are secured by a trust deed on buildings and a part of the land constituting Debtor's manufacturing plant in Pomona, California. Debtor has consequently been compelled drastically to curtail its operations and intends to stop all manufacturing operations not later than Friday, August 22, 1947, and Debtor does not propose to incur any additional indebtedness without the approval of the Court in this proceeding, except indebtedness necessary to the preservation of Debtor's properties. However, Debtor has been negotiating with prospective purchasers of Debtor's business and assets and is hopeful that during the pendency of these proceedings Debtor's Plan of Arrangement submitted herewith may be consummated.

Wherefore, Debtor prays that proceedings may be had on this petition in accordance with the provisions of Chapter XI of the Bankruptcy Act and without limitation of such general power:

1. That the Court accept this petition for the purpose of subjecting the Debtor, its property and its creditors to the [5] jurisdiction of this Court;

2. That during the pendency of these proceedings all creditors and other persons be enjoined from instituting or prosecuting, or continuing the prose-

cution of any actions, suits, or proceedings, at law or in equity, against Debtor, and from levying any attachments, executions or other writs or processes upon or against Debtor or any of its assets or properties, or from taking or attempting to take into their possession any of the assets or properties of Debtor;

3. That during the pendency of these proceedings Debtor be authorized to remain in possession of its properties, and to do all things necessary to carry out the provisions of the Plan of Arrangement if confirmed, subject, however, at all times to the regulation and control of this Court;

4. That notice be given to creditors fixing a date for the meeting of creditors;

5. That this petition be accepted by the Court as Debtor's application for the confirmation of the arrangement proposed by the Plan of Arrangement, and that the hearing upon said application for confirmation and of any objections thereto be set at such time as may appear appropriate to the Court;

6. That Debtor be ordered to print and mail to the persons entitled thereto under Chapter XI of the Bankruptcy Act a copy of the notice of meeting of creditors, said notice to be in a form approved by this Court and annexed to a copy of said order, and to be accompanied by a copy of the Plan of Arrangement and a summary of the Debtor's assets and liabilities as shown by the schedules annexed to this petition as the same may be hereafter supplemented;

7. That Debtor shall have such other and further relief [6] as shall be necessary and proper in the premises.

Dated: August 20, 1947.

SALSBURY MOTORS, INC.

By /s/ E. F. SALSBURY,

Vice-President

O'MELVENY & MYERS

And

/s/ GRAHAM L. STERLING, JR.

Attorneys for Petitioner.

(Duly Verified.)

[Endorsed]: Filed Aug. 20, 1947. [7]

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE UNDER SEC-
TION 322 OF THE BANKRUPTCY ACT.

At Los Angeles, in said District, on August 20, 1947, before the said Court the petition of Salsbury Motors, Inc., a corporation, that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Hugh L. Dickson, Esq., one of the referees in bankruptcy of this Court, to take such further

proceedings therein as are required by said Acts; and that the said Salsbury Motors, Inc., a corporation shall attend before said referee on August 27, 1947, and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Leon R. Yankwich, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on August 20, 1947.

EDMUND L. SMITH,
Clerk

(Seal) By /s/ F. BETZ,
Deputy Clerk

[Endorsed]: Filed Aug. 20, 1947. [9]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable the Judges of the United States District Court, in and for the Southern District of California, Central Division:

I, Hugh L. Dickson, Referee in Bankruptcy, to whom the above entitled proceedings were referred, do hereby certify:

1. The Petition of Salsbury Motors, Inc. under Chapter XI of the Bankruptcy Act was duly filed on August 20, 1947, and thereafter George T. Goggin was duly appointed and qualified as Receiver in said proceedings.

2. On September 8, 1947, Claimant, Bank of America National Trust and Savings Association, duly filed its Proof of Claim against the estate of the above named Debtor for the principal sum of \$601,482.80, plus interest in the sum of \$139.39, partially secured as therein set forth.

3. On November 20, 1947, George T. Goggin, Receiver, filed a Petition for an Order to Show Cause against said Claimant [10] with respect to the sum of \$34,073.50, which said Claimant had collected upon a promissory note executed by Jacques Power Saw Co. in favor of the Debtor herein. Order to Show Cause on said Petition came on for hearing on December 2, 1947, at which time said Claimant filed written Objections to the Jurisdiction of the Referee to entertain said Petition. For the sole purpose of determining jurisdiction certain facts were stipulated by counsel for the Claimant and Receiver and the matter submitted to your Referee. On December 8, 1947, your Referee filed a Memorandum Opinion indicating that the Objections of the Claimant to Jurisdiction should be overruled.

4. On December 19, 1947, George T. Goggin as Receiver filed Objections to Claim of Bank of America National Trust and Savings Association and Prayer for Affirmative Relief which Objections came on for hearing on January 12, 1948, at which time said Claimant duly filed an Answer to said Objections. At said time an Order was made and filed by your Referee overruling the Objections to the jurisdiction of your Referee to determine the

Petition of the Receiver for an Order to Show Cause Re: Jacques Power Saw Co. and pursuant to Stipulation of counsel for Receiver and said Claimant an Order was signed and filed herein consolidating the "Petition for Order to Show Cause Against Bank of America Re: Jacques Power Saw Co." and the "Objections to Claim of the Bank of America National Trust & Savings Association, and Prayer for Affirmative Relief" for all purposes of hearing and decision. Thereupon a Stipulation signed by counsel for the Receiver and Claimant was duly filed in said proceedings stipulating certain facts for all purposes of hearing and decision of said consolidated proceedings and the cause was submitted to the Referee.

5. Thereafter on March 4, 1948, your Referee filed a [11] "Memorandum Opinion on Claim of Bank of America" and thereafter on March 22, 1948, your Referee signed and filed Findings of Fact, Conclusions of Law and an Order Allowing Claim of Bank of America National Trust and Savings Association.

6. On April 8, 1948, George T. Goggin, as Receiver, within the time allowed by your Referee duly filed a Petition to Review the said Order allowing Claim entered March 22, 1948.

7. The question presented by the Petition to Review is whether or not said Order Allowing Claim is a proper Order and as all of the facts were stipulated, your Referee considers that the sole question for determination is whether the legal conclusions

and Order are correctly drawn from the stipulated facts.

Your Referee is transmitting with this Certificate on Review the following:

1. Claim of Bank of America National Trust and Savings Association;

2. Petition of George T. Goggin for Order to Show Cause Against Bank of America Re: Jacques Power Saw Co. filed November 20, 1947;

3. Order to Show Cause predicated on said Petition;

4. Objections of Bank of America to Jurisdiction of the Court in a summary proceeding against said Bank relating to a controversy concerning the lien and right of offset of the Bank on a promissory note and the proceeds received in payment thereof.

5. Reporter's Transcript on Hearing of said Objections to Jurisdiction on December 2, 1947;

6. Memorandum Opinion filed by your Referee December 8, 1947;

7. Objections to Claim of Bank of America National Trust and Savings Association and Prayer for Affirmative [12] Relief filed by George T. Goggin, Receiver, on April 19, 1947, and Notice of Hearing thereon;

8. Answer of Bank of America National Trust and Savings Association to Objections to Claim and Prayer for Affirmative Relief;

9. Order Overruling Objections to Jurisdiction and Consolidating Proceedings signed and filed January 12, 1948;

10. Stipulation and supplement thereto between George T. Goggin, as Receiver, and Bank of America National Trust and Savings Association, through their respective counsel, dated January 12, 1948, constituting all of the evidence submitted in said consolidated proceeding.

11. Memorandum Opinion on Claim of Bank of America dated March 4, 1948;

12. Findings of Fact, Conclusions of Law and Order Allowing Claim of Bank of America signed and filed March 22, 1948;

13. Petition for Review of Referee's Order of March 22, 1948, allowing Claim of Bank of America.

Dated: April 13, 1948.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed April 15, 1948. [13]

[Title of District Court and Cause.]

IN PROCEEDINGS UNDER CHAPTER XI,
SECTION 322, OF THE BANKRUPTCY
ACT, PROOF OF PARTIALLY SECURED
DEBT

At Los Angeles in the Southern District of California on September 8, 1947, came R. G. Hawley of the County of Los Angeles in said District, personally known to me and made oath and says:

That he is an officer, to wit, Assistant Cashier of Bank of America National Trust and Savings Association, a corporation, to wit, a national banking association, organized and existing under and by virtue of the laws of the United States and carrying on business in the City of Los Angeles, County of Los Angeles, and elsewhere in the State of California; that this proof of debt is made by deponent as agent of said association, duly authorized to make such proof, and that he has personal knowledge of the facts herein deposed.

That the said Salsbury Motors, Inc., a corporation, who on the 20th day of August, 1947, filed a petition under the provisions of Chapter XI, Section 322 of the Acts of Congress relating to bankruptcy, was on the date said petition was filed indebted to claimant in the principal sum of \$601,482.80, plus interest on \$159,300.00 of said amount at the rate of 4½% per annum from August 13, 1947, and is now indebted to claimant in the sum of \$509,267.18, plus interest on \$159,300.00 of said sum at 4½% per annum from August 13, 1947, and

plus interest on [14] \$349,967.18 of said sum of 3% per annum from August 20, 1947. That said indebtedness is represented by negotiable instruments, to wit, promissory notes, and that no judgment has been rendered thereon, and that the nature and cause of said indebtedness is as follows:

Promissory notes, made, executed and delivered to claimant by debtor in the total aggregate principal amount of \$780,000.00; that copies of said promissory notes are attached hereto, marked Exhibits "A" to "F," inclusive, and made a part hereof; that the promissory note marked Exhibit "A" bears interest at the rate of 4½% per annum; that the promissory notes marked Exhibits "B" to "F," inclusive, bear interest at the rate of 3% per annum; that at the time of the execution of the note marked Exhibit "A" and as security for same the debtor, as trustor, made, executed and delivered to Corporation of America, a California corporation, as trustee for claimant, as beneficiary, a deed of trust covering certain real property situated in the County of Los Angeles, a copy of which deed of trust is attached hereto and marked Exhibit "G," which deed of trust was on the 14th day of February, 1946, recorded in Book 22818, Page 139 of Records of the County Recorder of Los Angeles County. It is expressly provided under the terms of said deed of trust that it shall be security for any and all other indebtedness and obligations of trustor to beneficiary whether present or future; that claimant is informed and believes and on such information and belief states that the value

of the real property and improvements located thereon covered by said deed of trust is in the amount of \$300,000.00. Claimant does not waive any of its right in and to said security in the event that the value of said security exceeds said sum of \$300,000.00.

That, in addition to the aforementioned security, [15] claimant had in its possession on the date of the filing of the petition herein certain notes, drafts and bills of lading of debtor covering merchandise sold by debtor, which notes, drafts and merchandise on the date of the filing of the petition herein had a face value of \$175,519.48. Claimant holds said notes, drafts and bills of lading under its right of offset, counterclaims and bank's lien.

That, since the date of the filing of the petition herein, claimant has received as collections on said drafts the sum of \$92,215.62, which sum has been applied by claimant on the principal indebtedness owing by debtor to claimant and that the face value of the drafts, notes and merchandise now held by claimant is \$83,303.86. That the total estimated value of security now held by claimant amounts to \$383,303.86 and the estimated amount of the principal of the debt owing to claimant, which is unsecured at this time, is \$125,963.32.

That there are no offsets or counterclaims to said debt and claimant does not hold and has not, nor has any person by its order or to deponent's knowledge or belief for its use, hold any security or se-

curities for said indebtedness, except the security and offsets, counterclaims and banker's right of lien as hereinabove set forth.

That by filing this claim claimant does not waive any right to dispose of the collateral held by claimant to secure said indebtedness according to the terms of any agreement pursuant to which such security was delivered to claimant and pursuant to claimant's right of offset, counterclaim and banker's lien, and this claim is filed only as an alternative to the security held and it is this claimant's intention to dispose of this collateral and to file an amended claim for any indebtedness which may exist after the application of moneys received after [16] the disposition of said collateral.

/s/ R. G. HAWLEY.

Subscribed and sworn to before me this 8th day of September, 1947.

[Seal] /s/ CLARA K. DEN,
Notary Public in and for the County of Los Angeles, State of California. [17]

EXHIBIT "A"

Corporation Installment Real Estate Note
(Principal Payable in Installments—Interest
Separately)

Los Angeles, Cal., February 13, 1946
\$180,000.00

For value received, Salsbury Motors, Inc., a corporation, promises to pay in lawful money of the

United States of America, to the order of the Bank of America, National Trust & Savings Association, at its Los Angeles Main Branch in this city the principal sum of One Hundred Eighty Thousand Dollars, with interest payable quarterly, beginning August 13, 1946, in like lawful money from date on deferred balances until paid at the rate of Four and One-Half per cent per annum; and said principal sum payable as follows: Three Thousand Six Hundred Dollars (\$3,600.00), on the 13th day of August, 1946, and Three Thousand Six Hundred Dollars (\$3,600.00) on the 13th day of November, 1946, and Four Thousand Five Hundred Dollars (\$4,500.00) on the 13th day of February, 1947, and Four Thousand Five Hundred Dollars (\$4,500.00) on the 13th day of each and every third month thereafter until the 13th day of February, 1956, on which said date the entire balance of principal and interest then unpaid shall become due and payable.

If the interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal. If default be made in the payment when due of any part or installment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note.

A deed of trust dated February 13, 1946, secures the indebtedness evidenced by this note.

In Witness Whereof, the said Corporation has caused this note to be executed by its officers thereunto duly authorized and directed by a resolution

of its Board of Directors duly passed and adopted by a majority of said Board at a meeting thereof duly called, noticed, and held.

(Seal) SALSBUry MOTORS, INC.,
a Corporation,

By /s/ DON I. CARROLL,
President,

By /s/ M. W. LOWERY,
Secretary. [18]

Salsbury Motors, Inc.

Re- 8159

Date	Interest Paid		Paid on Account of Principal	
	Amount	Paid to	Amount	Balance
				180,000.00
12-19-46	535.50	12-13-46		
9-13-46	-----	-----	3,600.00	176,400.00
10-15-46	385.65	10- 1-46		
11-13-46	786.90	11-13-46	3,600.00	172,800.00
12-19-46	535.50	12-13-46		
1-20-47	535.50	1-13-47		
2-28-47	603.00	2-13-47	4,500.00	168,300.00
5-14-47	1,901.80	5-13-47	4,500.00	163,800.00
8-15-47	1,842.75	8-13-47	4,500.00	159,300.00

EXHIBIT "B"

UT 175930

Salsbury Motors

PROMISSORY NOTE

\$100,000.00

Los Angeles, California, February 13, 1947

For Value Received, the undersigned, Salsbury Motors, Inc., a corporation, promises to pay in lawful money of the United States of America to the order of Bank of America National Trust and Savings

Association at its Main Branch in this city the principal sum of one hundred thousand Dollars (\$100,000.00), with interest payable at maturity in like lawful money from the date hereon until paid at the rate of three per cent (3%) per annum, and said principal sum payable on May 14, 1947.

If interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal.

This note evidences a loan made pursuant to a Loan Agreement between the payee and the undersigned dated February 18, 1946, and subsequent amendments thereto.

(Seal) SALSBUry MOTORS, INC.,
By /s/ GAGE H. IRVING,
Vice President and General
Manager,
By /s/ G. R. CASE,
Secretary and Treasurer. [20]

EXHIBIT "C"

UT 169355

Salsbury Motors, Inc.

\$100,000.00

Los Angeles, California, June 27, 1946

For Value Received, the undersigned, Salsbury Motors, Inc., a corporation, promises to pay in lawful money of the United States, to the order of Bank of America National Trust and Savings Association at its Main Branch in this city the principal sum of \$100,000.00 (one hundred thousand dollars) with

interest payable quarterly in like lawful money from the date hereof on deferred balances until paid at the rate of three per cent (3%) per annum, said principal sum payable as follows:

\$20,000.00 on or before September 30, 1947.

\$30,000.00 on or before September 30, 1948.

\$30,000.00 on or before September 30, 1949, and

\$20,000.00 on or before September 30, 1950.

On which date the entire balance of principal and interest then unpaid shall become due and payable.

If interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal. If default be made in the payment when due of any part or installment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note.

This note evidences a loan made pursuant to a loan agreement between the payee and the undersigned dated February 18, 1946.

(Seal) SALSBUURY MOTORS, INC.,

By /s/ DON I. CARROLL,

President,

By /s/ M. W. LOWERY,

Secretary. [21]

EXHIBIT "D"

UT 170049

Salsbury Motors, Inc.

\$100,000.00

Los Angeles, California, July 16, 1946

For Value Received, the undersigned, Salsbury Motors, Inc., a corporation, promises to pay in lawful money of the United States, to the order of Bank of America National Trust and Savings Association at its Main Branch in this city the principal sum of \$100,000.00 (one hundred thousand dollars) with interest payable quarterly in like lawful money from the date hereof on deferred balances until paid at the rate of three per cent (3%) per annum, said principal sum payable as follows:

\$20,000.00 on or before September 30, 1947,

\$30,000.00 on or before September 30, 1948,

\$30,000.00 on or before September 30, 1949, and

\$20,000.00 on or before September 30, 1950.

On which date the entire balance of principal and interest then unpaid shall become due and payable.

If interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal. If default be made in the payment when due of any part or installment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note.

This note evidences a loan made pursuant to a loan

agreement between the payee and the undersigned dated Feb. 18, 1946.

(Seal) SALSBUKY MOTORS, INC.,

By /s/ DON I. CARROLL,
President,

By /s/ M. W. LOWERY,
Secretary. [22]

EXHIBIT "E"

UT 170518

Salsbury Motors

\$100,000.00

Los Angeles, California, August 1, 1946

For Value Received, the undersigned, Salsbury Motors, Inc., a corporation, promises to pay in lawful money of the United States, to the order of Bank of America National Trust and Savings Association at its Main Branch in this city the principal sum of \$100,000.00 (one hundred thousand dollars) with interest payable quarterly in like lawful money from the date hereof on deferred balances until paid at the rate of three per cent (3%) per annum, said principal sum payable as follows:

\$20,000.00 on or before September 30, 1947,
\$30,000.00 on or before September 30, 1948,
\$30,000.00 on or before September 30, 1949, and
\$20,000.00 on or before September 30, 1950,

On which date the entire balance of principal and interest then unpaid shall become due and payable.

If interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal. If default be made in the payment when due of any part or installment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note.

This note evidences a loan made pursuant to a loan agreement between the payee and the undersigned dated February 18, 1946.

(Seal) SALSBUry MOTORS, INC.,
By /s/ DON I. CARROLL,
President,
By /s/ M. W. LOWERY,
Secretary. [23]

EXHIBIT "F"

UT 170818

Salsbury Motors, Inc.

\$200,000.00

Los Angeles, California, August 15, 1946

For Value Received, the undersigned, Salsbury Motors, Inc., a corporation, promises to pay in lawful money of the United States, to the order of Bank of America National Trust and Savings Association at its Main Branch in this city the principal sum of \$200,000.00 (two hundred thousand dollars) with interest payable quarterly in like lawful money from the date hereof on deferred balances until paid at

the rate of three per cent (3%) per annum, said principal sum payable as follows:

\$40,000.00 on or before September 30, 1947,
\$60,000.00 on or before September 30, 1948,
\$60,000.00 on or before September 30, 1949, and
\$40,000.00 on or before September 30, 1950,

On which date the entire balance of principal and interest then unpaid shall become due and payable.

If interest be not so paid, it shall become part of the principal and thereafter bear like interest as the principal. If default be made in the payment when due of any part or installment of principal or interest, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note.

This note evidences a loan made pursuant to a loan agreement between the payee and the undersigned dated February 18, 1946.

(Seal) SALSBUry MOTORS, INC.,

By /s/ DON I. CARROLL,
President,

By /s/ M. W. LOWERY,
Secretary. [24]

EXHIBIT "G"

This Deed of Trust, made this 13th day of February, 1946, between Salsbury Motors, Inc., a corporation, as Trustor, ("Trustor" to be interpreted as "Trustors" where context requires), Corporation of America, a California corporation, as Trustee,

and Bank of America National Trust and Savings Association, a national banking association, as beneficiary,

Witnesseth: That Trustor Irrevocably Grants, Transfers and Assigns to Trustee, in Trust, With Power of Sale, the following described property situate in the County of Los Angeles, State of California, to-wit:

The Southwest quarter of Block 208 of Pomona Tract, in the City of Pomona, as per map recorded in Book 3, Page 95 of Miscellaneous Records, in the office of the County Recorder of said County; areas computed to centers of adjoining streets.

Except therefrom such portion as may have been heretofore conveyed to the Southern Pacific Railroad Company.

including all appurtenances and easements used in connection therewith, all water and water rights (whether riparian, appropriative, or otherwise, and whether or not appurtenant) used in connection therewith, all shares of stock evidencing the same, pumping stations, engines, machinery, pipes and ditches, including also all gas, electric, cooking, heating, cooling, air conditioning, refrigeration and plumbing fixtures and equipment which have been or may hereafter be attached in any manner to any building now or hereafter on the said property, or to the said property, and also the rents, issues and profits thereof, Subject, However, to the right, power and authority hereinafter given to and conferred

upon the Beneficiary to collect and apply such rents, issues and profits.

For the Purpose of Securing: (1) Payment of the sum of \$180,000.00 with interest thereon according to the terms of a promissory note or notes of even date herewith, made by Trustor, payable to the order of the Beneficiary, and extensions or renewals thereof; (2) payment of such additional amounts as may be hereafter loaned by Beneficiary or its successor to the Trustor or any of them, or any successor in interest of the Trustor, with interest thereon, and any other indebtedness or obligation of the Trustor, or any of them, and any present or future demands of any kind or nature which the Beneficiary or its successor may have against the Trustor, or any of them, whether created directly, or acquired by assignment, whether absolute or contingent, whether due or not, whether otherwise secured or not, or whether existing at the time of the execution of this instrument, or arising thereafter; (3) performance of each agreement of Trustor herein contained; and (4) payment of all sums to be made by Trustor pursuant to the terms hereof.

To Protect the Property and Security Granted by This Deed of Trust, Trustor Agrees:

(a) Properly to care for and keep said property and the buildings and improvements situate thereon in good condition and repair; to underpin and support, when necessary, any building or other improvement situate thereon, and otherwise to protect and preserve same; not to remove or demolish any build-

ing or improvement situate thereon; to complete or restore promptly, and in good and workmanlike manner, any building or improvement which may be constructed, damaged or destroyed thereon, and pay in full all costs incurred therefor; not to commit or permit waste of the property; to comply with all laws, covenants, conditions or restrictions affecting the property; to provide and maintain fire (and if required by Beneficiary, earthquake and other) insurance satisfactory to and with loss payable solely to Beneficiary, and to deliver all policies to Beneficiary, which delivery shall constitute assignment to Beneficiary of all return premiums; to appear in and defend, without cost to Beneficiary or Trustee, any action or proceeding purporting to affect the security hereunder, or the rights or powers of Beneficiary or Trustee, and, when required by Trustee or Beneficiary, to commence and maintain any action or proceeding necessary to protect such security and such rights or powers; and should Trustee or Beneficiary elect to appear in, defend, or commence and maintain any such action or proceeding, to pay all their costs and expenses, including attorney fees; to pay before delinquency, all taxes, assessments and charges affecting the property, including assessments on appurtenant water stock; to pay when due all encumbrances, charges and liens which appear to be prior or superior hereto; to pay all costs, fees and expenses of this trust; if said property be agricultural, to form said land in an approved and husbandmanlike manner, and to keep all trees, vines and crops on said land properly cultivated, irrigated,

fertilized, sprayed and fumigated; to replace all dead or unproductive vines or trees with new ones, and to keep all buildings, fences, ditches, canals, wells and other farming improvements on said premises in first-class condition, order and repair.

(b) Should Trustor fail to make any payment or do any act as herein provided, then Beneficiary or Trustee (but without obligation so to do, and without notice to or demand upon Trustor, and without releasing Trustor from any obligation hereunder) may make or do the same, and may pay, purchase, contest or compromise any encumbrance, charge or lien, which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability and expend whatever amounts in its absolute discretion it may deem necessary therefor. All sums so incurred or expended by Beneficiary or Trustee shall be without demand immediately due and payable by Trustor, and shall bear interest at the rate of ten per cent per annum, and be secured hereby.

It is Mutually Agreed That:

1. Should the property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire or earthquake, or in any other manner, Beneficiary shall be entitled, at its option, to commence, appear in and prosecute in its own name, any action or proceeding, or to make any compromise or settlement, in connection with such taking or damage, and to obtain all compensation, awards or other relief

therefor. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of insurance affecting said property, are hereby assigned to Beneficiary, who may release any money so received by it, or apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages and rights of action and proceeds, as Beneficiary or Trustee may require. The Trustee or Beneficiary may enter upon the property at any time during the existence of this trust for the purpose of inspection, or for the accomplishment of any of the purposes hereof.

2. By accepting payment of any sum hereby secured after its due date, or after filing of notice of default and of election to sell, Beneficiary shall not waive its rights to require prompt payment when due of all other sums so secured, or to declare default for failure so to pay, or to proceed with the sale under any such notice of default and of election to sell, for any unpaid balance of said indebtedness. If Beneficiary holds any additional security for any obligation secured hereby, it may enforce the sale thereof at its option, either before, contemporaneously with, or after the sale is made hereunder, and on any default of Trustor, Beneficiary may, at its option, offset against any indebtedness owing by it to Trustor, the whole or any part of the indebtedness secured hereby.

3. Without affecting the liability of any person, including Trustor, for the payment of any indebtedness secured hereby, or the lien of this deed of trust

on the remainder of the property for the full amount of any indebtedness unpaid, Beneficiary and Trustee are respectively empowered as follows: Beneficiary may from time to time and without notice (a) release any person liable for the payment of any of the indebtedness, (b) extend the time or otherwise alter the terms of payment of any of the indebtedness, (c) accept additional security therefor of any kind, including deeds of trust or mortgages, (d) alter, substitute or release any property securing the indebtedness; Trustee may, at any time, and from time to time, upon the written request of Beneficiary (a) consent to the making of any map or plat of the property, (b) join in granting any easement or creating any restriction thereon, (c) join in any subordination or other agreement affecting this deed of trust or the lien or charge thereof, (d) reconvey, without any warranty, all or any part of the property.

4. Upon payment in full of all sums secured hereby, and performance of all obligations of the Trustor hereunder, the Trustee shall reconvey, without warranty, the estate vested in it hereby. The grantee in any reconveyance made pursuant to this deed of trust may be described as "the person or persons legally entitled thereto," and the recitals therein of any matters or facts shall be conclusive proof of the truthfulness thereof. Upon default by Trustor in the payment of any indebtedness secured hereby, or in the performance of any agreement hereunder, or upon conveyance by Trustor of said property, or upon the divestment in any manner of his title

thereto, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In the event of default, Beneficiary shall execute or cause the Trustee to execute a written notice of such default and of its election to cause to be sold the property herein described, to satisfy the obligations secured hereby, and shall cause such notice to be recorded in the office of the Recorder of each county wherein said property, or some part thereof, is situated. Beneficiary may rescind any such notice before Trustee's sale by executing a notice of rescission and recording the same. The recordation of such notice shall constitute also a cancellation of any prior declaration of default and demand for sale, and of any acceleration of maturity of indebtedness affected by any prior declaration or notice of default. The exercise by Beneficiary of the right of rescission shall not constitute a waiver of any default then existing or subsequently occurring, nor impair the right of the Beneficiary to execute other declarations of default and demand for sale, or notices of default and of election to cause the property to be sold, nor otherwise affect the note or deed of trust, or any of the rights, obligations or remedies of the Beneficiary or Trustee hereunder.

5. At least three months having elapsed between the recordation of the notice of default and the date of sale, Trustee, having first given notice of sale as then required by law, and without demand on Trustor, shall sell the property at the time and place of sale fixed by it in the notice of sale, either as a whole or

in separate parcels, and in such order as the Trustee may determine, at public auction to the highest bidder for cash, in lawful money of the United States of America, payable at the time of sale. Trustee may postpone sale of all or any portion of the property by public announcement at the time of sale, and from time to time thereafter may postpone the sale by public announcement at the time fixed by the previous postponement, and without further notice it may make such sale at the time to which the same shall be so postponed. Trustee shall deliver to the purchaser its deed conveying the property so sold, but without any covenant or warranty, expressed or implied. The recital in any such deed of any matters or facts, stated either specifically or in general terms, or as conclusions of law or fact, shall be conclusive proof of the truthfulness thereof. Any person, including Trustor, Trustee or Beneficiary, may purchase at the sale. After deducting all costs, fees and expenses of Trustee and of this trust, including costs of evidence of title in connection with the sale, the Trustee shall apply the proceeds of the sale to the payment of all sums then secured hereby, in such order and manner as may be required by the Beneficiary; the remainder, if any, to be paid to the person or persons legally entitled thereto. If Beneficiary shall elect to bring suit to foreclose this deed of trust in the manner and subject to the provisions, rights and remedies relating to the foreclosure of a mortgage, Beneficiary shall be entitled to a reasonable sum to be fixed by the court as attorney fees expended in the prosecution of said action.

6. As additional security, Trustor hereby gives to and confers upon Beneficiary the right, power and authority, during the continuance of these trusts, to collect the rents, issues and profits of said property, or of any personal property [26] located thereon, with or without taking possession of the property affected hereby, reserving unto the Trustor the right, prior to any default by Trustor in payment of any indebtedness secured hereby, or in the performance of any agreement hereunder, to collect and retain such rents, issues and profits as they accrue and become payable. Upon any such default Beneficiary may at any time, without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, and in its own name sue for or otherwise collect such rents, issues and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine; also perform such acts of repair, cultivation, irrigation or protection, as may be necessary or proper to conserve the value of the property; also lease the same or any part thereof for such rental, term, and upon such conditions as its judgment may dictate; also prepare for harvest, harvest, remove, and sell any crops that may be growing upon the premises, and apply the proceeds thereof upon the indebtedness secured hereby. The entering upon and taking pos-

session of said property, the collection of such rents, issues and profits, and the application thereof as aforesaid, shall not waive or cure any default or notice of default hereunder, or invalidate any act done pursuant to such notice. Trustor also assigns to Trustee, as further security for the performance of the obligations secured hereby, all prepaid rents and all moneys which may have been or may hereafter be deposited with said Trustor by any lessee of the premises herein described, to secure the payment of any rent, and upon default in the performance of any of the provisions hereof, Trustor agrees to deliver such rents and deposits to the Trustee.

7. Any Trustor who is a married woman hereby expressly agrees that recourse may be had against her separate property for any deficiency after the sale of the property hereunder.

8. Should proceedings be instituted to register title of the property under any land title law, Trustor will pay upon demand all sums expended by Trustee or Beneficiary, including attorney fees, and forthwith deliver to Beneficiary all evidence of title.

9. The pleading of any statute of limitations as a defense to any and all obligations secured by this deed of trust is hereby waived to the full extent permissible by law.

10. Trustor further agrees that Beneficiary may from time to time and for periods not exceeding one year, in behalf of the Trustor, renew or extend any

promissory note secured hereby, and said renewal or extension shall be conclusively deemed to have been made when endorsed on said promissory note or notes by the Beneficiary in behalf of the Trustor.

11. Beneficiary may, from time to time, substitute another Trustee in the place of the Trustee herein named, to execute this trust. Upon such appointment, and without conveyance to the successor trustee, the latter shall be vested with all the title, powers and duties conferred upon the Trustee herein named. Each such appointment and substitution shall be made by written instrument executed by the Beneficiary, containing reference to this deed of trust sufficient to identify it, which, when recorded in the office of the County Recorder of the county or counties in which the property is situated, shall be conclusive proof of the proper appointment of the successor trustee.

12. This deed of trust shall inure to and bind the heirs, devisees, legal representatives, successors and assigns of the parties hereto. All obligations of each Trustor hereunder are joint and several. The rights or remedies granted hereunder, or by law, shall not be exclusive, but shall be concurrent and cumulative.

If a mailing address is set forth opposite any Trustor's signature hereto, and not otherwise, the undersigned Trustor shall be deemed to have requested that a copy of any notice of default, and of

any notice of sale hereunder, be mailed to said Trustor at said address.

Signature of Trustor

(Seal) SALSURY MOTORS, INC.,

a corporation,

By /s/ DON I. CARROLL,

President,

By /s/ M. W. LOWERY,

Secretary.

Mailing Address for Notices: 4464 District Blvd.,
Los Angeles 11, Calif.

State of California,
County of Los Angeles—ss.

On this 13th day of February, 1946, before me Gladys A. Hultmand, a Notary Public in and for said Los Angeles County, personally appeared Don I. Carroll known to me to be the President, and M. W. Lowery, known to me to be the Secretary of the Salsbury Motors, Inc., the Corporation that executed the within instrument, and also known to me to be the persons who executed the within instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

Witness my hand and official seal.

(Seal) /s/ GLADYS A. HULTMAN,

Notary Public in and for said
Los Angeles County and State.

[Endorsed]: Filed Sept. 9, 1947. [27]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE
AGAINST BANK OF AMERICA

RE: JACQUES POWER SAW CO.

To the Honorable Hugh L. Dickson, Referee in
Bankruptcy:

Comes now your petitioner George T. Goggin, and
respectfully represents:

I.

That he is the duly appointed, qualified and acting
Receiver in the within Chapter XI Proceedings.

II.

That on or about July 8, 1947, the debtor herein
deposited with the Bank of America, National Trust
& Savings Association, collection department, a
promissory note, on which Jacques Power Saw Co.
of Denison, Texas, was the payor and the debtor
herein was the payee; the note was due and payable
on July 16, 1947, in the principal amount of \$35,-
837.00, with an allowable off-set as against said note
in the sum of \$1,163.50, arising from a credit memo
issued by the debtor herein, No 62295, leaving a prin-
cipal balance owing on said note in the sum of
\$34,673.50. [30]

III.

That said note was returned to the Bank of Amer-
ica, National Trust & Savings Association, Collec-

tion Department, on August 1, 1947, as unpaid, and the debtor herein was so notified by the aforesaid bank.

IV.

Thereafter, negotiations were entered into between the debtor in the within proceedings, and the payor under said note, to-wit: Jacques Power Saw Co., of Denison, Texas, and on August 21, 1947, written confirmation of prior oral revocation of any authority to collect upon said note was given to the Bank of America, and receipt thereof was acknowledged by said Bank of America, in writing, on August 21, 1947; that on or about August 27, 1947, the payor under said note, Jacques Power Saw Co., paid to the within estate the sum of \$34,673.50, forwarding same through the Bank of America, National Trust & Savings Association; that said monies are monies belonging to your petitioner herein on behalf of the within estate, and in spite of demands made therefor, the aforesaid Bank of America has refused to turn over the said sum of \$34,673.50; that the within proceedings commenced on August 20, 1947, and the aforesaid \$34,673.50 constitutes an asset to be marshalled by your petitioner, as Receiver, in the administration of the within estate.

Wherefore, your petitioner prays that this Court issue an order directing the aforesaid Bank of America, National Trust & Savings Association to appear and show cause, if any, why this Court should not make an order forthwith directing said bank to pay

to your petitioner, as Receiver herein, the sum of \$34,673.50.

/s/ GEORGE T. GOGGIN,
Receiver, Petitioner.

GENDEL & CHICHESTER.

By /s/ MARTIN GENDEL,
Of Counsel for Receiver.

(Duly Verified.)

[Endorsed]: Filed Nov. 20, 1947. [31]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE RE. BANK OF
AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION

Upon Reading and Filing the verified petition of George T. Goggin, as Receiver, and upon motion of Martin Gendel, one of his counsel, and good cause appearing therefrom,

It Is Hereby Ordered that the Bank of America, National Trust & Savings Association, appear before Hugh L. Dickson, Referee, in his courtroom located on the 3rd floor of the Federal Building, Los Angeles, on the 2nd day of December, 1947, at 10 o'clock a.m., or as soon thereafter as counsel can be heard, then and there to show cause why the prayer of the petition, a copy of which accompanies the within Order to Show Cause, should not be granted, and why the said sum of \$34,673.50 should not forthwith be paid to the said Receiver.

The within Order to Show Cause, and copy of the petition, may be served, by properly mailing a copy thereof to the offices of Hugo Steinmyer, attorney of record for the Bank of America, National Trust & Savings Association, at least five days before the date of the above hearing.

Dated this 20th day of November, 1947.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed Nov. 20, 1947. [33]

[Title of District Court and Cause.]

Objections of Bank of America National Trust and Savings Association to Jurisdiction of the Court in a Summary Proceeding Against Said Bank Relating to a Controversy Concerning the Lien and Right of Offset of the Bank on a Promissory Note and the Proceeds Received in Payment Thereof.

Bank of America National Trust and Savings Association, a national banking association, the party mentioned in that certain order to show cause issued in the above-entitled proceeding by Hubert F. Laugharn, Referee, on November 20, 1947, hereby appears specially and objects to the jurisdiction of the Court and said Referee to hold and to hear such a summary proceeding on the ground that Bank of America National Trust and Savings Association had possession of, a lien on and the right of offset against all proceeds arising from the payment of, that certain

promissory note dated June 26, 1947, in the sum of \$35,837.00, payable to the order of the Debtor, and signed by Jacques Power Saw Co.

That the Receiver's petition for order to show cause sets forth facts clearly alleging that Bank of America National Trust and Savings Association on August 20, 1947, the date of the filing of the Debtor's petition in the above proceeding, and at all times since August 1, 1947, has had possession of said promissory note or the proceeds resulting from the payment of [34] the said promissory note.

Dated at Los Angeles, California, this 25th day of November, 1947.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION,

By /s/ (Illegible.)

Vice President.

POINTS AND AUTHORITIES

The situation in this case is that the Receiver in Bankruptcy does not have and never has had constructive or actual possession of the promissory note executed by Jacques Power Saw Co. Possession of said promissory note or of the proceeds received from the payment of said note has been in Bank of America National Trust and Savings Association at all times since prior to the filing of the petition in bankruptcy herein.

Volume 2, Collier on Bankruptcy (14th Ed.) paragraphs 23.04, page 449:

"Generally speaking, where the controversy is one

concerning property in the actual or constructive possession of the bankruptcy court, that court may adjudicate summarily all rights and claims pertaining thereto. Where the controversy is one involving property in the actual or constructive possession of a third person asserting a bona fide adverse claim, the bankruptcy court has no jurisdiction to determine summarily that person's claim upon petition by the receiver or trustee, unless by that person's consent. Without the consent of the adverse claimant, a plenary suit must be brought in the court of appropriate jurisdiction, and this will in turn be governed by Section 23 of the Act. These general principles regarding the summary jurisdiction of the bankruptcy court have been affirmed and reaffirmed in a chain of decisions beginning with *White v. Schloerb* and extending down to the present date."

Volume 2, *Collier on Bankruptcy*, (14th Ed.), paragraph 23.06, page 480:

"If the property is in the possession of the claimant, his claim is adverse, whether he claims to hold an absolute title to such property, or only asserts a lien upon it. For example, an alleged lien [35] by a bank against a sum on deposit with it may be an adverse claim, and so where a trust company has certain funds of a bankrupt corporation which are held under a trust agreement giving the company a lien for its services in retiring stock of the bankrupt, the rights of the trust company may not be determined in a summary proceeding. Likewise, a mortgagee, a consignor or conditional vendor, a surety, a

finance company under a trust receipt, or a pledgee, in possession prior to bankruptcy, have all been held to be adverse claimants subject only to a plenary suit to determine their interest.”

Bardes v. First National Bank of Hawarden,
178 U. S. 524.

Sec. 23 of the Federal Bankruptcy Act.

Volume 2, *Collier on Bankruptcy* (14th Ed), paragraph 23.06, page 481:

“Likewise a mortgagee, a consignor, or conditional vendor, a surety, a finance company under a trust receipt, or a pledgee, in possession prior to bankruptcy, have all been held to be adverse claimants subject only to a plenary suit to determine their interests.”

Volume 2, *Collier on Bankruptcy* (14th Ed.), paragraph 23.07, page 500:

“The fact that in an independent plenary action the claim may be found to be fraudulent or preferential does not make it any the less adverse, for that possibility does not make the claim merely colorable.”

HUGO A. STEINMEYER

and

JOHN E. WALTER,

By /s/ JOHN E. WALTER,

Attorneys for Bank of America National Trust and
Savings Association.

[Endorsed]: Filed Dec. 2, 1947. [36]

[Title of District Court and Cause.]

MEMORANDUM OPINION

On November 20, 1947, George T. Goggin, acting Receiver in the above named Chapter XI proceeding, filed a petition for order to show cause against the Bank of America concerning the collection by the Bank of America of the sum of \$34,673.50; the order being to show cause why this Court should not make an order directing the Bank of America to pay to George T. Goggin, the Receiver, the said sum of \$34,673.50.

The facts in this case are as follows:

On August 20, 1947, the Salsbury Motors, Inc., a corporation, filed a proceeding under Chapter XI in this Court, and on September 10, 1947, George T. Goggin was appointed Receiver. On August 19, 1947, the Bank of America received word from the Debtor that it intended to file Chapter XI proceedings, and immediately on the afternoon of August 19, 1947, the Bank of America shut off all credits or allowances to the Debtor to draw on any of its funds in the Bank of America.

On July 8, 1947, the Debtor deposited with the Bank of America for collection, a note payable by the Jacques Power Saw Co. of Denison, Texas, the proceeds of which, when obtained, would be deposited in their regular commercial account. This note was due and payable on July 16, 1947, in the face amount of \$35,837.00, but negotiations between the maker of the note and the Debtor resulted in a credit

memorandum of \$1,163.50, which left the amount due on the note, as above stated, \$34,673.50.

It is stipulated by the parties herein in a written stipulation that the Bank of America had not extended to the Debtor [37] any credit upon the faith of said note of the Jacques Power Co., and that the proceeds of the note, when collected, were to be deposited to the credit of the Debtor.

On August 21, 1947, there was delivered to the Bank of America, a notice in the following words and figures, to-wit:

“August 21, 1947

“Bank of America National
Trust and Savings Association,
Pomona, California

Attention: Mr. Farrend:

Gentlemen:

On July 8, 1947, we deposited with you for collection a promissory note on which Jacques Power Saw Company, of Denison, Texas, was the payor and Salsbury Motors, Inc., was the payee. The note was due July 16, 1947, and was in the principal amount of \$35,837.00.

Please be advised that your authority to collect said note is hereby terminated, effective immediately. Collection will be effected by direct dealings between ourselves and Jacques Power Saw Company.

Very truly yours,

SALSBURY MOTORS, INC.,
C. R. CASE,
General Manager.”

But not withstanding the notice advising the Bank that its authority to collect on the Jacques Power Saw Co. note had been terminated, the Bank of America on or about August 25 or 26, collected from said Jacques Power Saw Co. the sum of \$34,673.50, which it claims it has the right to retain and apply on the indebtedness owed to the Bank by the Debtor. The foregoing order to show cause was filed to compel the Bank of America to forward this amount of money to the Receiver.

The stipulation above referred to was entered into by the parties herein to permit the Referee to determine whether there is a color of title in the Bank on its objection to the jurisdiction of the Court to determine this order to show cause. [38]

In the first place, under Section 70 of the Bankruptcy Act, it is provided as follows: "Upon the confirmation of an arrangement or plan * * * or upon the order confirming the arrangement or plan, the title to the property dealt with is revested in the Bankrupt or Debtor." Under the terms of this section, undoubtedly the title of the Debtor to all its property is passed to the Receiver or a Trustee who might thereafter be elected.

Further, under the terms of the notice revoking the authority of the Bank of America to collect this particular note in question, I do not believe that the Bank, not having advanced any credit on this note, had the right to disregard the notice of revocation of authority to collect said note or to assume that it had the right to collect funds of the Debtor after it had filed under Chapter XI.

Furthermore, the Bank of America filed herein a claim and deducted from the face of their claim the amount which they had collected on the Jacques Power Saw Co. of Dennison, Texas, to-wit, the sum of \$34,673.50.

Under the authority of Chase National Bank of City of New York v. Lyford, 147 Fed. Rep. 2d 273, it is held:

“In railroad reorganization proceeding, a bank which set off debtor’s account in bank against debtor’s indebtedness and filed a claim for the balance could not object to summary proceedings on ground that bank was an adverse claimant, since the claim of the bank disclosing application of balance and presenting the net amount remaining after such application presented to the court the issue of validity of bank’s conduct in applying the balance.”

Therefore, I hold that there is no color of title in the Bank to the proceeds of the note in question [39] ~~and that the Receiver is entitled to an order directing the Bank of America to pay him the sum of \$34,573.50~~ [H.L.D.]. Therefore, the objection of the Bank of America to the jurisdiction of this Court is overruled.

Let the Receiver draw appropriate findings of fact and conclusions of law.

Dated: December 8, 1947.

/s/ HUGH L. DICKSON,

Referee in Bankruptcy.

[Endorsed]: Filed Dec. 8, 1947. [40]

[Title of District Court and Cause.]

OBJECTIONS TO CLAIM OF THE BANK OF
AMERICA NATIONAL TRUST & SAVINGS
ASSOCIATION, AND PRAYER FOR AFFIR-
MATIVE RELIEF.

To the Honorable Hugh L. Dickson, Referee in
Bankruptcy:

Comes now George T. Goggin, and respectfully al-
leges as follows:

I.

That he is the duly appointed, qualified and acting
Receiver in the within Chapter XI proceedings,
which commenced on the 20th day of August, 1947.

II.

That heretofore and by proof of claim bearing
date on the face thereof of September 8, 1947, the
Bank of America National Trust & Savings Asso-
ciation, a National Banking Association, hereinafter
referred to as "Bank of America," filed a proof of
claim in the within debtor proceedings, entitled "In
Proceedings Under Chapter XI, Section 322, of the
Bankruptcy Act, Proof of Partially Secured Debt";
that a reading of said proof of debt reflects that the
claimant has a contingent claim in the sense that it
has arbitrarily credited security held by it, consist-
ing primarily of certain land and improvements
thereon, as having a value of \$300,000.00; that until
the true value of said security can be determined,
no unsecured general claim can be allowed to the

said claimant, in the sum of \$125,963.32, or any other sum.

That in addition to the security of the real property, the proof [41] of claim recites that the claimant had in its possession on the date of the filing of the reorganization petition herein, certain notes, drafts and bills of lading of the debtor covering merchandise sold by the debtor, which notes, drafts and bills of lading, reflecting said merchandise so sold, had an alleged face value, on the date of the filing of the petition, of \$175,519.48, and that claimant holds said notes, drafts and bills of lading under an alleged right of offset, counterclaim and bank's lien.

That the debtor herein was the owner entitled to the physical possession of all of the aforesaid notes, drafts, checks, bills of lading and merchandise on the date that the petition for reorganization was filed in the within proceedings on August 20, 1947.

III.

In further objecting to the claim of the Bank of America your receiver alleges that the bank is not entitled to offset any portion of said \$175,519.48, and that no claim can be allowed to the Bank of America until it has turned over to your receiver the said notes, drafts, bills of lading and merchandise, or the monies collected thereon in the sum of \$175,519.48.

Facts Substantiating Prayer for Affirmative Relief.

IV.

That your receiver is informed and believes, and therefore alleges, that on the 20th day of August, 1947, Bank of America had in its custody those cer-

tain drafts, notes and bills of lading reflected by the items contained in Exhibit "A," which Exhibit "A" is attached hereto and made a part hereof by reference as though set forth verbatim; that your receiver is informed and believes, and therefore alleges, that the total amount of money reflected by said notes, drafts and bills of lading is in the sum of \$178,950.93; that your receiver is further informed, and believes, and therefore alleges, that Bank of America has collected \$122,949.88 as against said sum of \$178,950.93 and there remains, according to the information and belief of your receiver, approximately \$56,001.05 of uncollected checks, drafts, notes or bills of lading representing merchandise having a reasonable value in that amount as [42] of the commencement of the within debtor proceedings, and further itemized in Exhibit "B" attached hereto and made a part hereof by reference as though set forth verbatim; that at all times the debtor herein, prior to the commencement of the within proceedings, and the receiver herein since August 20, 1947, have had the right of possession and ownership in and to the uncollected items and the merchandise represented thereby.

V.

That Bank of America at no time advanced any credit to the debtor in the within proceedings on the basis of the aforesaid notes, drafts and bills of lading, and at no time permitted the debtor to draw checks against, or monies from, any of the aforesaid notes, drafts and bills of lading; that pursuant to the established arrangement between the debtor and Bank of

America no credit was issuable to the debtor until the monies represented by the notes, drafts and bills of lading would have been collected, and, after collection by Bank of America, these monies would then have been deposited in the commercial account of the debtor; that the aforesaid notes, drafts, bills of lading, and the merchandise represented thereby, at no time were pledged, in any manner, as security for the payment of any claims or obligations otherwise owing from the debtor to Bank of America; that as of the date of the filing of the proceedings herein on the 20th day of August, 1947, Bank of America had custody of the notes, drafts and bills of lading solely as the agent of the debtor herein, for the sole purpose of collecting the monies represented thereby and paying the said monies to the debtor; that upon the appointment and qualification of the undersigned as receiver herein, the receiver was entitled to the payment of all monies represented by Exhibit "A" herein, and your receiver was entitled to the possession of all returned scooters and engines as set forth in Exhibit "B" herein; that at no time did the receiver, or the debtor herein, convey any title to Bank of America covering all or any of the notes, drafts, bills of lading, or returned merchandise in question as described in Exhibit "B"; that in spite of the demand made therefor, Bank of America has failed and refused to turn over to your receiver the proceeds of the collections made by Bank of America commencing as of August 20, 1947, and has likewise failed and refused to [43] turn over the scooters and engines as described in Exhibit "B"; that as of the

close of business on August 19, 1947, Bank of America refused to permit debtor, or the undersigned as successor thereto in the capacity of receiver, to draw any monies upon the various bank accounts of the debtor, and the said Bank of America did take into its possession, under an alleged claim of Banker's Lien, the undersigned is informed and believes and therefore alleges, the sum of approximately \$161,125.55.

VI.

That included in Exhibit "A" is an item of \$34,673.50 which Bank of America collected on a note from Jacques Power Saw Company after the commencement of the within reorganization proceedings, and after the bankrupt had received written notice from the debtor not to make said collection; that prior to the filing of the within objections to claims, and prayer for affirmative relief, the undersigned, as receiver, has caused to be brought against Bank of America an order to show cause why said \$34,673.50 should not be forthwith turned over to the undersigned, as receiver; that if the said hearing on the aforesaid order to show cause is not consolidated with the within objections and petition for affirmative relief, there will be a duplication of relief to the extent of the said sum of \$34,673.50.

VII.

That Bank of America at no time was or is entitled to any claim of offset, counterclaim or Bank's Lien, with reference to said sum of \$178,950.93; that since the said notes, drafts, bills of lading and returned merchandise have been wrongfully withheld

from the undersigned, as receiver, by Bank of America, said Bank of America is indebted to the undersigned as receiver of the within estate in the sum of \$178,950.93, the said amount representing assets of the within estate collected and withheld by Bank of America after the commencement of the within Chapter XI proceedings, and in the sole capacity of agent and employee of the debtor and the receiver herein, and without any color of title, or bona fide adverse claim thereto; that the undersigned, as receiver, pursuant to his obligations under law, alleges that the said Bank of America should be required to forthwith turn over the said sum of \$178,950.93 as an asset of the [44] within estate payable to the undersigned as receiver, in the course of his administration herein.

Wherefore, the undersigned, as receiver in the within debtor proceedings, prays as follows:

1. That his objections as receiver to the claims of the Bank of America in the sum of \$125,963.32, or in any other sum, be sustained until the matters set forth hereinabove have been determined by this Court.

2. That this Court make an affirmative order directing the Bank of America to forthwith turn over to the undersigned, as receiver herein, the sum of \$178,950.93.

Dated: December 18, 1947.

/s/ GEORGE T. GOGGIN,
Receiver, Petitioner.

/s/ MARTIN GENDEL,
Of Counsel for Receiver. [45]

EXHIBIT "A"

Salsbury Motors, Inc.

List of Drafts or Notes in Possession of Bank of
America National Trust and Savings Association,
Pomona Branch, as of August 20, 1947.

Drawee-Purchaser	Amount
Funderburke's Garage, Marianna, Florida.....	\$ 40.50
Roy Waterbury. Sitka. Alaska.....	1,059.28
E. I. Clarke. Ltd., Edmonton, Alberta, Canada.....	88.25
Jess York, San Angelo, Texas.....	573.90
Beecraft and Lund, West Palm Beach, Florida.....	1,206.40
Texas Tile & Marble Co., Amarillo, Texas.....	1,205.90
Collins Concrete Prod. Co., Inc., Hanover, Pa.....	1,017.00
Hi-lo Equipment Co., Omaha, Nebraska.....	6,356.25
Concord Office Supply Co., Penacook, New Hampshire....	3,016.00
Idaho Cyclery. Boise, Idaho.....	1,508.00
D & D Sales Co., Toledo, Ohio.....	9,216.80
Brush Cycle Co., Spokane, Washington.....	1,809.60
Wichita Supply & Mfg., Wichita 2, Kansas.....	2,118.75
Alton Automotive Sales & Service, Alton, Illinois.....	476.94
Miles L. Hallman, Emmaus, Pennsylvania.....	10,638.96
Johnston Motors, Helena, Montana.....	904.80
Tri-State Motor Scooter Dist., Evansville, Indiana.....	1,809.60
Jacques Power Saw Co., Denison, Texas.....	34,673.50
Leeser Motor Co., Topton, Pennsylvania.....	829.80
Schott Motorcycle Supply, Lewiston, Maine.....	3,026.33
Jess York, San Angelo, Texas.....	573.90
McDaniel's Serv. Station, Big Spring, Texas.....	593.55
Strong Motors Limited, Saskatoon, Saskatchewan, Can- ada	2,585.75
Beecraft & Lund, West Palm Beach, Florida.....	1,170.55
Ever-ready Auto Service, Midland, Texas.....	2,766.00
Fred Deeley, Vancouver, B. C., Canada.....	1,701.50
Tri-State Motor Scooter, Evansville, Indiana.....	1,247.81
Paszamount Distr. Co., New Brunswick, New Jersey.....	3,431.45
Ever-Ready Auto Service, Midland, Texas.....	243.32
Scooter Sales Corp., Norfolk, Virginia.....	229.50
Concord Office Supply Co., Penacook, New Hampshire....	3,016.00

Drawee-Purchaser	Amount
Hellgate Motors, Missoula, Montana.....	1,206.40
Motor Scooter Dist. Co., Omaha, Nebraska.....	904.80
W. W. Warsaw, Waterloo, Iowa.....	17,646.00
Dresden Tile Yard, Dresden, Ontario, Canada.....	990.00
Neil K. Hoak, Huron, Ohio.....	1,508.00
Beecroft & Lund, West Palm Beach, Florida.....	603.20
Schrader Cycle & Marine Sales, Cobleskill, New York....	904.80
Boyd's Hobby Shop, Lubbeck, Texas.....	1,382.00
Beecraft & Lund, West Palm Beach, Florida.....	603.20
Paszamount Distr. Co., New Brunswick, New Jersey.....	4,222.40
Alton Auto Sales & Serv., Alton, Illinois.....	17,645.85
The Motorette Corp., Buffalo, New York.....	4,775.00
The Motorette Corp., Buffalo, New York.....	4,775.00
Neil K. Hoak, Huron, Ohio.....	1,508.00
Harley-Davidson Sales, Gadsden, Alabama.....	1,508.00
Alton Automotive Sales & Service, Alton, Illinois.....	17,645.85
Alton Automotive Sales & Service, Alton, Illinois.....	527.79
Fletcher Tire Co., Inglewood, California.....	1,458.75
Total	<hr/> \$178,950.93

EXHIBIT "B"

Date Shipped	Date of B/L	Date Dep. in Bank	Customer	No. of Scooters	Amount
8/13	8/13	8/14	W. W. Warsaw	30	\$ 8,823.00
8/13	8/13	8/14	W. W. Warsaw	30	8,823.00
7/24	7/24	7/25	Neil K. Hoak	5	1,508.00
8/11	8/11	8/12	Neil K. Hoak	5	1,508.00
7/14	7/14	7/15	Alton Automotive Sales & Serv.	60	17,645.85
7/31	7/31	8/1	Paszamant Dist. Co.	14	4,222.40
8/6	8/6	8/7	Beecroft & Lund	2	603.20
8/11	8/11	8/12	Beecroft & Lund	2	603.20
					<hr/>
					148
					<hr/>
S/D Invoices billed to customers; S/D held by Bank of America					
7/16	7/16	7/17	Harley-Davidson Sales	5	\$ 1,508.00
7/24	7/24	7/25	Helgate Motors	4	1,206.40
7/27	7/27	7/28	Motorette Corp. (50 engines)	...	4,775.00
7/28	7/28	7/29	Motorette Corp. (50 engines)	...	4,775.00
					<hr/>
					9
					<hr/>
					\$12,264.40
					<hr/>
					157
					<hr/>
					100
					<hr/>
					\$56,001.05

Scooters
Engines

[Endorsed]: Filed Dec. 22, 1947. (48]

(Duly Verified.)

[Title of District Court and Cause.]

Notice of Hearing on Objections to Claim of Bank
of America National Trust & Savings Association
and Prayer by Receiver for Affirmative
Relief

To the Bank of America National Trust & Savings
Association, and to Hugo Steinmeyer, Esq., Its
Attorney:

You and Each of You Will Please Take Notice,
that a hearing on the objections of George T. Gog-
gin, as Receiver, to the claim of the Bank of Amer-
ica National Trust & Savings Association and on
his prayer for affirmative relief, a copy of which ob-
jections and affirmative relief are attached to the
within notice, will be held before Hon. Referee
Hugh L. Dickson, in his courtroom located on the
3rd floor of the Federal Building, Los Angeles,
California, on the 12th day of January, 1948, at the
hour of 10 o'clock a.m., or as soon thereafter as
counsel can be heard.

Dated this 19th day of December, 1947.

GENDEL & CHICHESTER,

By /s/ MARTIN GENDEL,

Of Counsel for George T.

Goggin as Receiver.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Dec. 22, 1947. [50]

[Title of District Court and Cause.]

ANSWER OF BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION TO OBJECTIONS TO CLAIM AND PRAYER FOR AFFIRMATIVE RELIEF

Comes now claimant, Bank of America National Trust and Savings Association, and in answer to the Objections To Claim and Prayer for Affirmative Relief filed by George T. Goggin, Receiver herein, admits, denies and alleges as follows:

I.

That said Objections to Claim fail to state facts sufficient to constitute a basis for lawful objection to the allowance of the claim of claimant filed herein.

II.

The allegations of said Objections designated "Facts Substantiating Prayer for Affirmative Relief" fail to state facts sufficient to show any basis for affirmative relief in accordance with the prayer of said Objections.

III.

The above-entitled court has no jurisdiction to hear and [52] determine or make any order upon said prayer for affirmative relief for the reason that it affirmatively appears from the Receiver's Petition that claimant upon the filing of the Petition in the above-entitled proceedings was in actual possession of the notes, drafts and bills of lading referred to in the said Petition under a bona fide

claim of right thereto and the above-entitled court has no jurisdiction in a summary proceeding to make any order directing any disposition thereof.

IV.

Referring to the allegations of paragraph II of said Objections, claimant denies that it has or has filed a contingent claim in the above-entitled proceedings and on the contrary alleges that its claim is fixed and certain and for a liquidated amount, to wit, upon an indebtedness in the principal sum of \$601,482.80 as of the date of filing the Petition herein, with interest thereon as set forth in said claim. Claimant denies that the debtor on the date of filing the Petition in the above-entitled proceedings was entitled to the physical possession of the notes, drafts, checks, bills of lading and the merchandise referred to in said objections.

V.

Claimant denies the allegations of paragraph III of said Objections.

VI.

Claimant denies all of the allegations of paragraph IV of said Objections commencing with the words "that your receiver is further informed, and believes," on line 28, page 2 thereof, to the end of said paragraph IV, and in this connection claimant alleges as follows:

On August 20, 1947, claimant had in its possession drafts drawn upon drawee purchasers in the amounts set opposite their [53] respective names as described and set forth on pages 1 and 2 of

Exhibit "A" to the said Objections to Claim, and likewise had in its possession in each of said transactions order bills of lading representing the right to receive the merchandise described therein which was in course of shipment to the said drawee purchasers. Claimant collected all of said drafts and delivered the merchandise evidenced by the bills of lading to the drawee purchasers with the exception of the specific transactions hereinafter set forth:

(a) Subsequent to August 20, 1947, Hellgate Motors, Missoula, Montana, rejected payment of the draft for \$1,206.40 described in Exhibit "A"; claimant caused the said merchandise to be diverted to another purchaser who paid the said draft and accepted said merchandise, and claimant received a net amount of \$1,123.86 after deduction of additional freight charges;

(b) The Alton Auto Sales & Serv., Alton, Illinois, rejected payment of one draft for \$17,645.85 and claimant caused said merchandise to be diverted to another purchaser and received a net amount of \$16,995.95 after deducting additional freight charges thereon;

(c) Each of the following drawee purchasers rejected drafts drawn upon them, to wit:

Motor Scooter Dist. Co.,

Omaha, Nebraska	\$ 904.80
W. W. Warsaw,	

Waterloo, Iowa	17,646.00
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Neil K. Hoak,

Huron, Ohio	1,508.00
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Beecroft & Lund, West Palm Beach, Florida.....	603.20
Beecroft & Lund, West Palm Beach, Florida	603.20
Paszamount Distr. Co., New Brunswick, New Jersey.....	4,222.40
Neil K. Hoak, Huron, Ohio	1,508.00
Harley-Davidson Sales, Gadsden, Alabama	1,508.00
Alton Automotive Sales & Service, Alton, Illinois	17,645.85

Thereafter claimant caused the merchandise forwarded with said drafts consisting of 153 scooters to be returned to Pomona, California, and temporarily stored in the plant of the debtor under the terms of an agreement entered into between claimant, and George T. Goggin, Receiver in the above-entitled proceedings, confirmed and approved by the Honorable Hugh L. Dickson, Referee in the above-entitled proceedings, by which agreement it was agreed that said scooters would be held in the plant of the debtor for storage and safekeeping only and would be redelivered to claimant upon demand. Claimant incurred liability for and paid freight and demurrage charges of \$4,931.47 in returning the said scooters to Pomona. Thereafter claimant employed the debtor, through the Receiver herein, to perform work and services upon said scooters and paid to the Receiver the sum of \$1,461.86, repre-

senting the cost thereof. Thereafter on December 2, 1947, claimant sold the said 153 scooters for the sum of \$34,425, which was the reasonable value of said scooters at the time of sale and the best and only price obtainable therefor, which represented a net realization of \$28,031.67 upon said nine items for which drafts aggregating \$46,149.45 were in claimant's possession on August 20, 1947;

(d) The Motorette Corp., Buffalo, New York, rejected two drafts for \$4,775.00 each, each of which was accompanied by bills of lading entitling the holder to possession of 50 engines; that claimant caused the said engines to be stored in Buffalo, New York, pending a possible sale thereof and to date claimant has incurred and paid insurance and warehouse charges in the sum of \$82.01 thereon and has incurred liability for further storage charges, [55] the amount of which has not been ascertained.

VII.

Referring to the allegations in paragraph V of said Objections, claimant admits that it has refused to turn over to the Receiver the proceeds of collections in the possession of claimant on August 20, 1947, and has refused to deliver to the Receiver the 100 engines referred to in Exhibit "B" to said Objections, and denies each and all of the remaining allegations of said paragraph V, and in this connection claimant alleges as follows:

On or about February 18, 1946, claimant loaned to the debtor in the above-entitled proceeding the sum of \$180,000 secured by a trust deed upon the

real property upon which the plant of the debtor was located and under date of February 18, 1946, entered into an agreement with said debtor by the terms of which it agreed to extend credit to the debtor in the aggregate sum of \$500,000 to be repayable in annual installments on or before September 30, 1950. Thereafter on or about September 3, 1946, by an amendment to said agreement, claimant agreed to increase the amount of credit to be extended to the debtor by the additional sum of \$450,000 until September 30, 1947; that thereafter claimant did lend to said debtor the aggregate amount of \$600,000 pursuant to the terms of said credit agreement as amended. That continuously from the date of said agreement the said debtor in the usual course of business deposited with claimant for collection and credit to the debtor's commercial deposit account notes and drafts accompanied by shipping documents evidencing sales of merchandise by the debtor. From the date of said loan agreement debtor regularly maintained its deposit accounts with claimant as a bank of deposit. On August 19, 1947, there was on deposit in various deposit accounts of debtor with claimant the sum of [56] \$161,125.55, all of which had been deposited in the ordinary course of business, and on said day said deposit balances were offset against the indebtedness of debtor to claimant which was past due. On August 19 and on August 20, 1947, there was in the possession of claimant notes and drafts in the aggregate amount of \$178,950.93 accompanied by shipping documents, all of which

had been deposited with claimant in the ordinary course of business for collection and credit to the deposit accounts of the debtor. On August 20, 1947, and at all times subsequent thereto, claimant held possession of said collection items under its general banker's lien authorized and recognized by the laws of the State of California; upon each of said collection items the obligation of claimant to credit the deposit accounts of the debtor upon collection thereof and the general indebtedness of the debtor to claimant constituted mutual credits within the meaning of Section 68(a) of the Bankruptcy Act.

VIII.

Referring to the allegations of paragraph VI of said Objections, claimant admits that included in the last of items set forth in Exhibit "A" is a promissory note of \$34,673.50 and that a proceeding to recover the said sum is now pending in the above-entitled court and objects to a consideration in the present proceeding of any issue concerning the said note unless the said proceeding shall be consolidated with the above proceeding.

IX.

Claimant denies all the allegations of paragraph VII of said Objections.

As a Further and Separate Defense to the Said Objections to Claim and Prayer for Affirmative Relief, Claimant Alleges: [57]

I.

That said Objections are premature in that claimant as a secured creditor is entitled to convert the securities held as security for its claim into money according to the terms of the agreement pursuant to which such securities were delivered to creditor; that part of the security held by claimant is a trust deed upon real property of the debtor and sufficient time to cause the said real property to be sold pursuant to the terms of the deed of trust has not elapsed; that no plan of arrangement has as yet been submitted to unsecured creditors in the above-entitled proceedings and claimant believes that if such plan of arrangement is submitted the value of the real property held as security for the claim of claimant may be reached by agreement, arbitration or compromise; that claimant has used its best efforts to dispose of the remaining engines held by it under its banker's lien but has been unable to sell the same at a price considered reasonable.

Wherefore, claimant prays that the objections of the Receiver to the claim of claimant be overruled and that claimant's claim be allowed in the principal sum of \$601,482.80 plus interest thereon as set forth in said claim, less the amounts that have heretofore been collected by claimant upon the collection items as hereinabove set forth, and less the value of the real property and the remaining merchandise held by claimant as soon as the value thereof can properly be ascertained, and for such

other and further relief as may be proper in the premises.

HUGO A. STEINMEYER,
G. L. BERREY, and
JOHN E. WALTER,

By /s/ HUGO A. STEINMEYER,
Attorneys for Claimant, Bank of America National
Trust and Savings Association. [58]

State of California,
County of Los Angeles—ss.

A. J. Robillard, being by me duly sworn, deposes and says; that he is an officer, to wit, an Assistant Secretary of Bank of America National Trust and Savings Association, claimant in the foregoing action, and as such officer is authorized to make oath for and on behalf of said corporation; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters he believes it to be true.

/s/ A. J. ROBILLARD.

Subscribed and sworn to before me this 10th day of January, 1948.

[Seal] /s/ CLARA K. DEN,
Notary Public in and for Said
County and State.

[Endorsed]: Filed Jan. 12, 1948. [59]

[Title of District Court and Cause.]

OVERRULING OBJECTIONS TO JURISDICTION AND CONSOLIDATING PROCEEDINGS

George T. Goggin, the Receiver herein, having heretofore filed a "Petition for Order to Show Cause against Bank of America Re: Jacques Power Saw Co." and upon the hearing upon said petition Bank of America National Trust and Savings Association heretofore filed its objections to the jurisdiction of this court to determine said petition in a summary proceeding; and the undersigned Referee having heretofore filed a memorandum opinion upon said objections,

Now, Therefore, It Is Hereby Ordered that said objections to jurisdiction of said Bank of America National Trust and Savings Association be and the same hereby are overruled; and

The Receiver herein having filed "Objections to Claim of the Bank of America National Trust and Savings Association, and Prayer for Affirmative Relief" and the parties having stipulated that the said petition of said Receiver and the said objections to claim might be consolidated for hearing and decision,

Now, Therefore, It Is Hereby Ordered that the "Petition for Order to Show Cause against Bank of America Re: Jacques Power Saw Co." filed herein by the said Receiver on or about November 20, 1947, and the "Objections to Claim of the Bank of America National Trust and Savings Associa-

tion, and Prayer for Affirmative Relief” filed herein by said Receiver on or about December 19, 1947, be and they hereby are consolidated for all purposes of hearing and decision.

Dated: January 12, 1948.

/s/ HUGH L. DICKSON,
Referee.

Approved as to form.

/s/ MARTIN GENDEL,
Counsel for Receiver.

/s/ HUGO A. STEINMEYER,

/s/ G. L. BERREY,

/s/ JOHN E. WALTER,

Counsel for Bank of America National Trust and
Savings Association.

[Endorsed]: Filed Jan. 12, 1948. [61]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between George T. Goggin, Receiver herein, through his attorneys Gendel & Chichester, by Martin Gendel, and Bank of America National Trust and Savings Association, a claimant herein, through its counsel, Hugo A. Steinmeyer, G. L. Berrey and John E. Walter, that the “Objections to Claim and Prayer for Affirmative Relief” filed in the above-entitled proceedings on or about December 19, 1947, and the “Petition for Order to Show Cause Against Bank of America

Re: Jacques Power Saw Co.” filed herein on or about the 20th day of November, 1947, may be consolidated for all purposes of trial and decision and that the objections to jurisdiction filed by said Bank of America National Trust and Savings Association, hereinafter for convenience referred to as claimant, shall not be deemed waived by the making of this stipulation.

For all purposes of hearing and decision of said consolidated [62] proceedings, the following facts are hereby stipulated:

I.

On or about February 18, 1946, claimant loaned to the debtor in the above-entitled proceedings the sum of \$180,000 secured by a deed of trust upon the real property upon which the plant of the debtor was located. The said deed of trust provided by its terms that it should secure the repayment of said \$180,000 and any and all other indebtedness of the debtor to claimant whether then existing or thereafter created. Under date of February 18, 1946, claimant entered into an agreement with said debtor by the terms of which claimant agreed to extend credit to the debtor in the aggregate sum of \$500,000, to be repayable in annual installments on or before September 30, 1950. Thereafter on or about September 3, 1946, by an amendment to said agreement, claimant agreed to increase the amount of credit to be extended to the debtor by an additional revolving credit of not to exceed \$450,000 until September 30, 1947. That thereafter claimant loaned to said debtor

the aggregate amount of \$600,000 pursuant to the terms of said credit agreement as amended.

II.

That continuously from the date of said agreement the debtor regularly maintained its deposit accounts with claimant as a bank of deposit. That continuously from the date of said agreement the debtor deposited with claimant for collection and credit to the debtor's commercial deposit account notes and drafts accompanied by order bills of lading evidencing sales of merchandise by the debtor and in the regular course of business said drafts were collected and the proceeds credited to said commercial account. That during the period from June, 1946, until December, 1946, the amount of collection items deposited with claimant averaged from \$40,000 to \$50,000 per month, and during the year [63] 1947 up to August 20, 1947, the collection items so deposited with claimant averaged approximately \$150,000 per month.

III.

On August 19, 1947, the debtor was in default in the payment of its indebtedness to claimant; on said date claimant offset from the various deposit accounts with the debtor the balances thereof in the aggregate amount of \$161,125.55. After the offset of said balances there was due and unpaid on account of the indebtedness of debtor to claimant the principal sum of \$601,482.80 and interest on the sum of \$159,300 from August 13 to August 19, 1947, inclusive, in the sum of \$139.39.

On August 20, 1947, the date of filing the Petition in the above-entitled proceeding, claimant held in its hands the notes or drafts drawn upon drawee purchasers in the amount set opposite their respective names as described and set forth in pages 1 and 2 of Exhibit "A" to the Objections to Claim filed by the receiver herein, and likewise held in its hands in each of said transactions order bills of lading representing the right to receive the merchandise described therein which was in course of shipment to the various drawee purchasers.

IV.

Subsequent to August 20, 1947, claimant collected all of said notes and drafts and delivered the merchandise evidenced by the bills of lading to the drawee purchasers with the exception of the specific transactions hereinafter set forth:

(a) Subsequent to August 20, 1947, Hellgate Motors, Missoula, Montana, rejected payment of the draft for \$1,206.40 described in Exhibit "A"; claimant caused the said merchandise to be diverted to another purchaser who paid the said draft and accepted said merchandise, and claimant received a net amount of \$1,123.86 after deduction of additional freight charges; [64]

(b) The Alton Automotive Sales & Service, Alton, Illinois, rejected payment of one draft for \$17,645.85 and claimant caused said merchandise to be diverted to another purchaser and received a net amount of \$16,995.95 after deducting additional freight charges thereon;

(c) Each of the following drawee-purchasers rejected drafts drawn upon them, to wit:

Drawee-Purchaser	Amount
Motor Scooter Dist. Co., Omaha, Nebraska	\$ 904.80
W. W. Warsaw, Waterloo, Iowa	17,646.00
Neil K. Hoak, Huron, Ohio	1,508.00
Beecroft & Lund, West Palm Beach, Florida.....	603.20
Beecroft & Lund, West Palm Beach, Florida.....	603.20
Paszamount Distr. Co., New Brunswick, New Jersey.....	4,222.40
Neil K. Hoak, Huron, Ohio	1,508.00
Harley-Davidson Sales, Gadsden, Alabama	1,508.00
Alton Automotive Sales & Service, Alton, Illinois	17,645.85
	<hr/>
	\$46,149.45

Thereafter claimant caused the merchandise forwarded with said drafts consisting of 153 scooters to be returned to Pomona, California, and temporarily stored in the plant of the debtor under the terms of an agreement in writing designated "Agreement and Order Concerning Possession and Sale of Motor Scooters" entered into between George T. Goggin, Receiver of Salsbury Motors,

Inc., Debtor, and claimant under date of September 22, 1947, and confirmed and approved by an order of the Honorable Hugh L. Dickson, Referee, in the above-entitled proceedings on September 23, 1947; that said agreement is hereby expressly referred to and incorporated herein [65] with like effect as though herein set forth in full.

Claimant incurred liability for and paid freight and demurrage charges in the aggregate amount of \$4,931.47 in causing the said 153 motor scooters to be returned to the plant of the debtor at Pomona, California. Thereafter claimant employed the debtor through the receiver herein to perform work and services upon said motor scooters and paid to the receiver the sum of \$1,461.86, representing the cost thereof. On or about October 16, 1947, claimant was informed by the receiver that sales of motor scooters had dropped off rapidly. In the latter part of November, 1947, the receiver had not sold all of the motor scooters then on hand and was unable to find a purchaser for the 153 motor scooters held by claimant. In the latter part of November claimant endeavored to secure a purchaser for said 153 motor scooters and on December 2, 1947, sold the said 153 motor scooters for the sum of \$34,425, which was the best and only price claimant was able to secure upon the sale thereof.

(d) The Motorette Corp., Buffalo, New York, rejected two drafts for \$4,775.00 each, each of which was accompanied by bills of lading entitling the holder to 50 engines; that claimant caused the said

engines to be stored in Buffalo, New York, pending a possible sale thereof. Claimant has incurred and paid insurance and warehouse charges in the sum of \$82.01 on said engines, and further charges are accruing. No purchaser for the said engines has been found.

V.

Included among the said collection items listed and described in Exhibit "A" to said Objections was a promissory note executed by the Jacques Power Saw Co. of Denison, Texas, payable to the debtor in the principal amount of \$35,837 on July 16, 1947. The said promissory note was deposited by the debtor with the claimant [86] on or about July 8, 1947, for collection and credit to the commercial deposit account of the debtor and was transmitted to the correspondent of claimant in Denison, Texas. Payment of said note was refused and it was returned to claimant on or about July 31, 1947. On or about August 1, 1947, claimant informed the debtor that said note had been returned and debtor instructed claimant to re-submit the said note for collection.

On or about June 30, 1947, the debtor had issued on its books but had not completed carrying forward a credit memorandum of \$1,163.50 to said Jacques Power Saw Co. to cover undelivered items which had originally been included in the amount of the note.

On August 21, 1947, the debtor delivered to claimant a letter in words and figures as follows:

August 21, 1947.

“Bank of America National
Trust and Savings Association
Pomona, California

Attn: Mr. Farrand

Gentlemen:

On July 8, 1947, we deposited with you for collection a promissory note on which Jacques Power Saw Company of Denison, Texas, was the payor and Salsbury Motors, Inc., was the payee. The note was due July 16, 1947, and was in the principal amount of \$35,837.00.

Please be advised that your authority to collect said note is hereby terminated, effective immediately. Collection will be effected by direct dealings between ourselves and Jacques Power Saw Company.

Very truly yours,

SALSBURY MOTORS, INC.

/s/ G. R. CASE,
General Manager.”

On or about August 22, 1947, the debtor agreed with the maker of the note that the credit memorandum of \$1,163.50 was a proper credit upon the note. On or about August 25, 1947, the maker of the note paid the net amount of \$34,653.50 to claimant's correspondent bank [67] in Denison, Texas, upon

surrender of the note and said funds were received by claimant on or about August 27, 1947.

VI.

None of the notes and drafts or bills of lading accompanying the same deposited by the debtor with claimant as collection items during the course of the operation of the business of the debtor from the time of the loan agreement on February 18, 1946, to the date of filing the petition in the above-entitled proceedings was at any time pledged by the debtor to secure any indebtedness of the debtor to claimant. No immediate credit was given by claimant to the deposit accounts of the debtor upon the deposit of any of said collection items but all of said items were deposited with claimant for collection and credit of the proceeds of the collection to the deposit account of the debtor when said collections were completed. During the period from February 18, 1946, to August 19, 1947, claimant did, in the usual course of business, credit to the deposit account of the debtor, as and when received, the proceeds of all collection items in accordance with the instructions of the debtor. In each of the collection items in the hands of claimant on August 20, 1947, the debtor had issued and claimant had accepted instructions to credit the proceeds of said collections when received to the commercial deposit account of the debtor.

It is further stipulated that upon the hearing of the said Objections either party may introduce ad-

ditional evidence not inconsistent with the facts hereinabove stipulated.

Dated: January 12, 1948.

/s/ MARTIN GENDEL,

Counsel for George T.

Goggin, Receiver.

HUGO A. STEINMEYER,

G. L. BERREY, and

JOHN E. WALTER.

By /s/ HUGO A. STEINMEYER,

Counsel for Bank of America National Trust and Savings Association, Claimant. [68]

SUPPLEMENT

On or about September 8, 1947, claimant duly filed its Proof of Claim against the estate of the above-named debtor for the principal sum of \$601,-482.80, together with interest thereon as therein set forth.

Claimant has refused to turn over to the Receiver any of the notes, drafts or collection items hereinbefore referred to or the proceeds thereof.

/s/ MARTIN GENDEL,

Counsel for George T.

Goggin, Receiver.

HUGO A. STEINMEYER,

G. L. BERREY, and

JOHN E. WALTER.

By /s/ HUGO A. STEINMEYER,

Counsel for Bank of America National Trust and Savings Association, Claimant.

[Endorsed]: Filed Jan. 12, 1948. [69]

[Title of District Court and Cause.]

MEMORANDUM OPINION ON CLAIM OF BANK OF AMERICA

The Receiver has filed in these proceedings objections to the claim of Bank of America National Trust and Savings Association coupled with a prayer for affirmative relief by which he seeks to recover from said Bank property which was in the Bank's possession at the date of the filing of the petition and upon which the Bank has asserted a general banker's lien for the indebtedness of the debtor to the bank.

The facts in this controversy are stipulated to so that there is no dispute on that point and it only remains to decide the legal question involved.

After reading the many, many cases cited by parties on both sides, I am satisfied that the true answer to the question is to be found in the case of *Golsalves v. Bank of America*, 16 Cal. (2d) 169 (1940), where at page 173 the Court said:

“To understand this exercise of the bank's right it is necessary to state briefly its nature. Section 3054 of the Civil Code provides: ‘A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business.’ The banker's lien described in this statute is, properly speaking, a lien on the securities such as commercial paper deposited with the bank

by the customer in the course of business. The so-called 'lien' of the bank on the depositor's account or funds on deposit is not technically a lien, for the bank is the owner of the funds and the debtor of the depositor, and the bank cannot have a lien on its own property. The right of the bank to charge the depositor's fund with his matured indebtedness is more correctly termed a right of setoff, based upon general principles of equity. (See *Pendleton v. Hellman Commercial T. & S. Bank*, 58 Cal. App. 448 (208 Pac. 702); 11 Cal. L. Rev. 111, 112; 7 Cal. L. Rev. 341; 38 Harv. L. Rev. 800; *Brown on Personal Property*, p. 519.)"

As I said above, I am satisfied that the case affords the true construction of Section 3054 of the Civil Code of California, which gives a banker a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business.

In this case it appears that it was the practice of the debtor to place sight drafts and other commercial paper for collection with the Bank of America, and as and when said drafts were collected the said amount was to be credited to the account of the debtor. The drafts in dispute in this matter were deposited in that course of business.

Therefore, I hold that the Bank is entitled to retain the money which it collected upon these sight drafts and that the claim as filed by the Bank of America, which is undisputed, be allowed.

Counsel for the Bank will prepare appropriate findings of fact, conclusion of law and order, and serve a copy of the same upon opposing counsel.

Dated this 4th day of March, 1948.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed Mar. 4, 1948. [72]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ALLOWING CLAIM

The Receiver herein, George T. Goggin, heretofore filed in the above entitled proceeding a "Petition for Order to Show Cause Against Bank of America Re: Jacques Power Saw Co." which Petition came on for hearing upon Order to Show Cause directed to Bank of America National Trust and Savings Association on December 2, 1947, at which time said Bank filed written objections to the jurisdiction of the Referee to make an order upon said Petition; and

Thereafter George T. Goggin, Receiver herein, filed "Objections to Claim of the Bank of America National Trust & Savings Association, and Prayer for Affirmative Relief" and the Claimant, Bank of America National Trust and Savings Association, filed its answer to said objections; and

The said objections to the claim came on for hearing before the Referee on January 12, 1948, the Receiver being represented by his attorneys Gendel &

Chichester appearing by Martin [73] Gendel, and the Claimant being represented by its attorneys Hugo A. Steinmeyer and John E. Walter; and

The Referee made and filed an Order Overruling Objections to Jurisdiction and consolidating Proceedings by which the "Petition for Order to Show Cause against Bank of America Re: Jacques Power Saw Co." filed herein by the Receiver on or about November 20, 1947, and "Objections to Claim of the Bank of America National Trust & Savings Association and Prayer for Affirmative Relief" filed herein by said Receiver on or about December 1, 1947, were consolidated for all purposes of hearing and decision; and

The parties having stipulated to the facts involved in said petitions by a stipulation in writing filed in said proceedings and the cause having been argued by respective counsel and submitted to the Referee and the Referee being fully advised in the premises having made and filed a "Memorandum Opinion on Claim of Bank of America";

Now, Therefore, the Referee does hereby make the following

FINDINGS OF FACT

I.

It is true, as alleged in paragraph II of the Receiver's objections, that Bank of America National Trust and Savings Association, hereinafter referred to as the Claimant, did file a proof of claim in the within debtor proceedings entitled "In Proceedings

Under Chapter XI, Section 322 of the Bankruptcy Act, Proof of Partially Secured Debt'', which proof of claim disclosed that said Claimant held partial security for the said indebtedness set forth therein. It is not true that said claim is a contingent claim. The allegations of the second paragraph of paragraph II of the said objections of the Receiver are untrue. The allegations of the third paragraph of paragraph II are untrue. [74]

II.

On or about February 18, 1946, Claimant loaned to the debtor in the above entitled proceedings the sum of \$180,000 secured by a deed of trust upon the real property upon which the plant of the debtor was located. The said deed of trust provided by its terms that it should secure the repayment of said \$180,000 and any and all other indebtedness of the debtor to claimant whether then existing or thereafter created. Under date of February 18, 1946, Claimant entered into an agreement with said debtor by the terms of which Claimant agreed to extend credit to the debtor in the aggregate sum of \$500,000, to be repayable in annual installments on or before September 30, 1950. Thereafter on or about September 3, 1946, by an amendment to said agreement, Claimant agreed to increase the amount of credit to be extended to the debtor by an additional revolving credit of not to exceed \$450,000 until September 30, 1947. That thereafter Claimant loaned to said debtor the aggregate amount of \$600,000 pursuant to the terms of said credit agreement as amended.

III.

That continuously from the date of said agreement the debtor regularly maintained its deposit accounts with Claimant as a bank of deposit. That continuously from the date of said agreement the debtor deposited with Claimant for collection and credit to the debtor's commercial deposit account notes and drafts accompanied by order bills of lading evidencing sales of merchandise by the debtor and in the regular course of business said drafts were collected and the proceeds credited to said commercial account. That during the period from June, 1946, until December, 1946, the amount of collection items deposited with Claimant averaged from \$40,000 to \$50,000 per month, and during the year 1947 up to August 20, 1947, the collection items so deposited [75] with Claimant averaged approximately \$150,000 per month.

IV.

On August 19, 1947, the debtor was in default in the payment of its indebtedness to Claimant; on said date Claimant offset from the various deposit accounts with the debtor the balances thereof in the aggregate amount of \$161,125.55. After the offset of said balances there was due and unpaid on account of the indebtedness of debtor to Claimant the principal sum of \$601,482.80 and interest on the sum of \$159,300 from August 13 to August 19, 1947, inclusive, in the sum of \$139.39.

On August 20, 1947, the date of filing the Petition in the above entitled proceeding, Claimant held in its hands notes or drafts drawn upon drawee pur-

chasers in the amounts set opposite their respective names as described and set forth in pages 1 and 2 of Exhibit "A" to the Objections to Claim filed by the Receiver herein, and likewise held in its hands in each of said transactions order bills of lading representing the right to receive the merchandise described therein which was in course of shipment to the various drawee purchasers.

V.

Subsequent to August 20, 1947, Claimant collected all of said notes and drafts and delivered the merchandise evidenced by the bills of lading to the drawee purchasers with the exception of the specific transactions hereinafter set forth:

(a) Subsequent to August 20, 1947, Hellgate Motors, Missoula, Montana, rejected payment of the draft for \$1,206.40 described in Exhibit "A"; Claimant caused the said merchandise to be diverted to another purchaser who paid the said draft and accepted said merchandise, and Claimant received a net amount of \$1,123.86 after deduction of additional freight charges;

(b) The Alton Automotive Sales & Service, Alton, [76] Illinois, rejected payment of one draft for \$17,645.85 and Claimant caused said merchandise to be diverted to another purchaser and received a net amount of \$16,995.95 after deducting additional freight charges thereon;

(c) Each of the following drawee-purchasers rejected drafts drawn upon them, to wit:

Drawee-Purchaser	Amount
Motor Scooter Dist. Co., Omaha, Nebraska	\$ 904.80
W. W. Warsaw, Waterloo, Iowa	17,646.00
Neil K. Hoak, Huron, Ohio	1,508.00
Beecroft & Lund, West Palm Beach, Florida.....	603.20
Beecroft & Lund, West Palm Beach, Florida.....	603.20
Paszamount Distr. Co., New Brunswick, New Jersey.....	4,222.40
Neil K. Hoak, Huron, Ohio	1,508.00
Harley-Davidson Sales, Gadsden, Alabama	1,508.00
Alton Automotive Sales & Service, Alton, Illinois	17,645.85
	<hr/>
	\$46,149.45

Thereafter Claimant caused the merchandise forwarded with said drafts consisting of 153 scooters to be returned to Pomona, California, and temporarily stored in the plant of the debtor under the terms of an agreement in writing designated "Agreement and Order Concerning Possession and Sale of Motor Scooters" entered into between George T. Goggin, Receiver of Salsbury Motors, Inc., Debtor, and Claimant under date of September 22, 1947, and confirmed and approved by an order of the Honorable Hugh L. Dickson, Referee in the above entitled proceedings, on September 23, 1947. [77]

Claimant incurred liability for and paid freight and demurrage charges in the aggregate amount of \$4,931.47 in causing the said 153 motor scooters to be returned to the plant of the debtor at Pomona, California. Thereafter Claimant employed the debtor through the Receiver herein to perform work and services upon said motor scooters and paid to the Receiver the sum of \$1,461.86, representing the cost thereof. On or about October 16, 1947, Claimant was informed by the Receiver that sales of motor scooters had dropped off rapidly. In the latter part of November, 1947, the Receiver had not sold all of the motor scooters then on hand and was unable to find a purchaser for the 153 motor scooters held by Claimant. In the latter part of November Claimant endeavored to secure a purchaser for said 153 motor scooters and on December 2, 1947, sold the said 153 motor scooters for the sum of \$34,425, which was the best and only price Claimant was able to secure upon the sale thereof.

(d) The Motorette Corp., Buffalo, New York, rejected two drafts for \$4,775.00 each, each of which was accompanied by bills of lading entitling the holder to 50 engines; that Claimant caused the said engines to be stored in Buffalo, New York, pending a possible sale thereof. Claimant has incurred and paid insurance and warehouse charges in the sum of \$82.01 on said engines, and further charges are accruing. At the date of hearing no purchaser for the said engines had been found.

VI.

Claimant has received \$150,510.71 as the proceeds of collection items having a face amount of \$169,400.93 and said \$150,510.71 constitutes a reduction of Claimant's claim against the estate of the debtor.

VII.

Included among the said collection items listed and described [79] in Exhibit "A" to said Objections was a promissory note executed by the Jacques Power Saw Company of Denison, Texas, payable to the debtor in the principal amount of \$35,837 on July 16, 1947. The said promissory note was deposited by the debtor with the Claimant on or about July 8, 1947, for collection and credit to the commercial deposit account of the debtor and was transmitted to the correspondent of Claimant in Denison, Texas. Payment of said note was refused and it was returned to Claimant on or about July 31, 1947. On or about August 1, 1947, Claimant informed the debtor that said note had been returned and debtor instructed Claimant to re-submit the said note for collection.

On or about June 30, 1947, the debtor had issued on its books but had not completed carrying forward a credit memorandum of \$1,163.50 to said Jacques Power Saw Company to cover undelivered items which had originally been included in the amount of the note.

On August 21, 1947, the debtor delivered to Claimant a letter in words and figures as follows:

August 21, 1947

“Bank of America
National Trust and Savings Association
Pomona, California

Attn.: Mr. Farrand

Gentlemen:

On July 8, 1947 we deposited with you for collection a promissory note on which Jacques Power Saw Company of Denison, Texas, was the payor and Salsbury Motors, Inc., was the payee. The note was due July 16, 1947, and was in the principal amount of \$35,837.00.

Please be advised that your authority to collect said note is hereby terminated, effective immediately. Collection will be effected by direct dealings between ourselves and Jacques Power Saw Co.

Very truly yours,

SALSBURY MOTORS, INC.,

/s/ G. R. CASE,

General Manager.” [80]

On or about August 22, 1947, the debtor agreed with the maker of the note that the credit memorandum of \$1,163.50 was a proper credit upon the note. On or about August 25, 1947, the maker of the note paid the net amount of \$34,653.50 to Claimant's correspondent bank in Denison, Texas, upon surrender of the note and said funds were received by Claimant on or about August 27, 1947. Said sum of \$34,653.50 is part of the aggregate sum of \$150,510.71 received

by Claimant as specified in paragraph VI of these findings.

VIII.

None of the notes and drafts or bills of lading accompanying the same deposited by the debtor with Claimant as collection items during the course of the operation of the business of the debtor from the time of the loan agreement on February 18, 1946, to the date of filing the petition in the above entitled proceedings was at any time pledged by the debtor to secure any indebtedness of the debtor to Claimant. No immediate credit was given by Claimant to the deposit accounts of the debtor upon the deposit of any of said collection items but all of said items were deposited with Claimant for collection and credit of the proceeds of the collection to the deposit account of the debtor when said collections were completed. During the period from February 18, 1946, to August 19, 1947, Claimant did, in the usual course of business, credit to the deposit account of the debtor, as and when received, the proceeds of all collection items in accordance with the instructions of the debtor. In each of the collection items in the hands of Claimant on August 20, 1947, the debtor had issued and Claimant had accepted instructions to credit the proceeds of said collections when received to the commercial deposit account of the debtor.

IX.

On or about September 8, 1947, Claimant duly filed its [81] proof of claim against the estate of the above named debtor for the principal sum of \$601,482.80, together with interest thereon as therein set forth.

Claimant has refused to turn over to the Receiver any of the notes, drafts or collection items hereinbefore referred to or the proceeds thereof.

X.

To the extent that they may be inconsistent with the foregoing facts, the allegations of paragraphs IV, V, VI and VII of the Receiver's objections to claim are untrue.

XI.

The allegations of paragraphs IV, VI and VII of Claimant's answer to objections to claim are true.

XII.

The allegations of paragraph I of the separate defense of Claimant to the said objections are true.

And from the foregoing Findings of Fact, the Referee makes the following

CONCLUSIONS OF LAW

I.

The Claimant is entitled to hold the said collection items that were in the hands of Claimant at the date of filing the Petition in the above-entitled proceedings under its claim of a general banker's lien and to hold the proceeds of such collections or the sale of the property represented thereby and apply the same upon the indebtedness of debtor to Claimant.

II.

The Receiver is not entitled to the possession of the collection items in the hands of the Claimant at the time of filing the Petition in the above-entitled

proceedings and is not entitled to any of the proceeds of said collections. [82]

III.

The receiver's objections to claim of Claimant should be overruled and said claim allowed for the principal sum of \$601,482.80, plus interest in the sum of \$139.39 as set forth in said claim, from which shall be deducted the sum of \$150,510.71 received by Claimant upon collection items in the hands of Claimant on August 20, 1947, and subject to the requirements that there shall be applied upon the balance of said indebtedness the net proceeds of the sale of the real property securing said indebtedness and the net amounts received by Claimant upon the collection items described in Finding V(d) or the sale of the motors referred to therein.

IV.

Claimant is entitled to participate as an unsecured creditor in all dividends paid upon unsecured claims for the balance of its claim as so determined.

Now, Therefore, from the foregoing Findings of Fact and Conclusions of Law, the Referee makes the following

ORDER

It Is Hereby Ordered that the Receiver's "Petition for Order to Show Cause Against Bank of America Re: Jacques Power Saw Co." be and it hereby is denied; and

It Is Further Hereby Ordered that the objections of the Receiver to the claim of Bank of

America National Trust and Savings Association heretofore filed herein be and the same are hereby overruled and the prayer for affirmative relief of said Receiver be and it is hereby denied; and

It Is Further Hereby Ordered that the claim of Bank of America National Trust and Savings Association filed herein is hereby allowed in the sum of \$601,482.80 principal, and interest in the sum of \$139.39, from which there shall be deducted the sum [83] \$150,510.71 heretofore received by said Claimant from the proceeds of collection items in its possession at the date of filing the Petition in the above-entitled proceedings, and subject to the requirement that the net proceeds of the sale of the real property securing said indebtedness and the net proceeds of the remaining uncollected collection items in the possession of said Claimant shall be applied in reduction of the balance of said claim; and

It Is Further Ordered that said Claimant shall be entitled to dividends upon the said claim at the same rate paid to unsecured creditors when the remainder of the security held by said Claimant has been liquidated and the proceeds applied upon the unpaid balance of said claim.

Done in open court this 22nd day of March, 1948.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed Mar. 16, 1948. [84]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER OF MARCH 22, 1948 ALLOWING
THE CLAIM OF BANK OF AMERICA

To The Honorable Hugh L. Dickson, Referee in
Bankruptcy:

Comes now your petitioner, George T. Goggin,
and respectfully represents as follows:

I.

That he is the duly appointed, qualified and acting
Receiver in the within Chapter XI reorganization
proceedings.

II.

That your petitioner filed a petition for order to
show cause against the Bank of America National
Trust & Savings Association (hereinafter referred
to as "Bank of America"), involving a note of the
Jacques Power Saw Co., which petition duly came
on for hearing before this Court pursuant to an
order to show cause, on December 2, 1947; that the
petition was first duly submitted on the issue of
objection to the jurisdiction of this Court by the
Bank of America and the said objections to jurisdic-
tion were overruled by opinion of this Court filed on
December 8, 1947. [86]

III.

That the Bank of America filed a proof of claim
in the within debtor proceedings, dated September
8, 1947, and entitled "In Proceedings Under Chapter
XI, Section 322 of the Bankruptcy Act, Proof of

Partially Secured Debt''; that your petitioner, on or about December 19, 1947, filed written objections to the claim of Bank of America, and prayed therein for affirmative relief to the extent of \$178,950.93; by written stipulation dated January 12, 1948, the hearing on the merits of the petition and the order to show cause re Jacques Power Saw Company and on the objections to the claim of Bank of America and prayer for affirmative relief, were duly consolidated and the matters submitted before this Court for hearing on January 12, 1948; the matter having been duly submitted, this Honorable Court on the 4th day of March, 1948, filed a Memorandum Opinion disallowing the objections of your petitioner to the claims of the Bank of America, and the prayer for affirmative relief and denying any relief to your petitioner on the order to show cause re Jacques Power Saw Company; thereafter counsel for the Bank of America presented proposed findings of fact, conclusions of law and order and your petitioner submitted specifications of objections to the aforesaid findings of fact.

IV.

That on or about March 22, 1948, the above entitled Court made and filed its written findings of fact and conclusions of law, and, based thereon, made its order as follows:

“It Is Hereby Ordered that the Receiver’s “Petition for Order to Show Cause against Bank of America re Jacques Power Saw Company” be and it hereby is denied; and

“It Is Further Hereby Ordered that the objections of the Receiver to the claim of Bank of America

National Trust and Savings Association heretofore filed herein be and the same are hereby overruled and the prayer for affirmative relief of said [87] Receiver be and it is hereby denied; and

“It Is Further Hereby Ordered that the claim of Bank of America National Trust and Savings Association filed herein is hereby allowed in the sum of \$601,482.80 principal, and interest in the sum of \$139.39, from which there shall be deducted the sum of \$150,510.71 heretofore received by said claimant from the proceeds of collection items in its possession at the date of filing the petition in the above entitled proceedings, and subject to the requirements that the net proceeds of the sale of the real property securing said indebtedness and the net proceeds of the remaining uncollected collection items in the possession of said Claimant shall be applied in reduction of the balance of said claim; and

“It Is Further Ordered that said claimant shall be entitled to dividends upon the said claim at the same rate paid to unsecured creditors when the remainder of the security held by said claimant has been liquidated and the proceeds applied upon the unpaid balance of said claim.

Done in open court this 22nd day of March, 1948.

HUGH L. DICKSON,
Referee in Bankruptcy.”

V.

That said order is erroneous for the following reasons:

(a) That said order is predicated upon findings of fact which do not have any substantial evidence in

support thereof, or are contrary to the evidence, in the following particulars:

(1) The findings of fact fail to include the evidence introduced before this Court by oral stipulation in the hearings on the Jacques Power Saw Company matter, held before this Court on December 2, 1947;

(2) That paragraphs V and VI of the findings of fact, and the portions of the order predicated thereon, and all the allegations contained therein, are unsupported by any evidence whatsoever. [88]

(3) That the findings of fact are contrary to the evidence, in that they do not clearly reflect that the notes and drafts in question were placed by the debtor in the hands of the Bank of America for collection only, and that not until after the collections were made was the moneys to be deposited in the commercial account of the debtor; that no collections were made on said notes and drafts, in question, prior to August 20, 1947, the date of commencement of the within Chapter XI proceedings, and, as of that date, and prior to the collection of the monies, demand for the notes and drafts was made by petitioner, as receiver, and refused by the Bank of America.

(b) Since the Bank of America held the notes and drafts in the face amount of \$178,950.93, as agent of the debtor, and for the special purpose of collection, only, said bank violated its limited authority by refusing to turn over the notes and drafts to your petitioner, as receiver; therefore, the bank converted the notes and drafts and became indebted to your petitioner in the sum of \$178,950.93, having violated

the limited rights accruing to the bank by virtue of having only custody of the notes and drafts as agent of the debtor and Receiver.

(c) That the Bank of America had no right of set-off against the said notes and drafts, there being no status of mutual creditor and debtor as required by the Bankruptcy Act, particularly Section 68(a)1 thereof. The only relationship being that of principal and agent, not of debtor and creditor, as far as the notes and drafts are concerned, the Bank of America should have been directed by the Court to turn over the said sum of \$178,950.93.

(d) The Bank of America had no general banker's lien nor any lien by virtue of Section 3054 of the Civil Code of the State of California, for the reason that it had extended no credit in reliance upon the anticipated collection of the notes and drafts, and [89] had custody of the notes and drafts for the limited and special purpose, only, of collecting same and had not collected the monies thereon as of the commencement of the within debtor proceedings on August 20, 1947; upon which date the rights of the estate and creditors were frozen and the bank could not thereafter acquire any banker's lien, particularly since it had only custody, not possession, of the notes and drafts.

VI.

In connection with the within petition for review, your petitioner respectfully requests that the following documents be certified to the District Judge:

1. Petition of George T. Goggin, for Order to Show Cause against Bank of America, re Jacques Power Saw Company, filed November 20, 1947.

2. Order to Show Cause predicated on said petition above referred to.

3. Objections of Bank of America National Trust & Savings Association to Jurisdiction of the Court in a Summary Proceeding against said Bank relating to a controversy concerning the lien and right of offset of the Bank on a Promissory Note and the proceeds received in payment thereof, filed on December 2, 1947.

4. Memorandum Opinion of this Court overruling the objection to jurisdiction, dated December 8, 1947.

5. Proof of claim of Bank of America, dated September 8, 1947.

6. Objections to Claim of Bank of America National Trust & Savings Association, and prayer for affirmative relief, filed by George T. Goggin, receiver, on December 19, 1947.

7. Stipulation and Supplement thereto, between George T. Goggin, as receiver, and the Bank of America, etc., dated January 12, 1948. [90]

8. Reporter's Transcript of oral stipulation re Jacques Power Saw Company, made before this Court on December 2, 1947.

9. Opening Memorandum of Receiver in Support of Objections to Claim of Bank of America, and Prayer for Affirmative Relief.

10. Claimant's Points and Authorities in Opposition to Objections to Claim, filed by the Bank of America.

11. Closing Memorandum of Receiver in Support of Objections to Claim of Bank of America, and Prayer for Affirmative Relief.

12. Reply to Closing Memorandum of Receiver in

Support of Objections to Claim of Bank of America,
and Prayer for Affirmative Relief.

13. Reply of Receiver to the Reply to Closing
Memorandum of Receiver.

14. Memorandum of Opinion filed by this Court
on the consolidated matters involved, filed on March
4, 1948.

15. Specifications of Objections to Findings of
Fact and Order allowing claim filed by George T.
Goggin, as Receiver herein.

16. Findings of Fact, Conclusions of Law and
Order of the Referee, dated March 22, 1948, denying
relief sought by the Receiver herein with reference
to the Bank of America.

17. The within Petition for Review.

Wherefore, your petitioner prays for a review of
said order of March 22, 1948, by the Judge of the
District Court, and that said order be reversed and
that the objections of George T. Goggin, as receiver,
to the claims of the Bank of America, be sustained,
and that the prayer for relief be granted and said
Bank of America be ordered to pay to this estate the
sum of \$178,950.93.

Dated April 7th, 1948.

/s/ GEORGE T. GOGGIN,
Receiver Petitioner.

/s/ MARTIN GENDEL,
Of Counsel for Receiver.

(Duly Verified.)

[Endorsed]: Filed April 7, 1948. [97]

[Gendel & Chichester Letterhead.]

April 16, 1948

Honorable Hugh L. Dickson
Referee in Bankruptcy
343 Federal Building
Los Angeles, California

Re: Salsbury Motors, Inc.—(Bank of America
Petition on Review)

Dear Judge Dickson:

In checking over the documents being forwarded in connection with your Certificate on Review, I noted that item No. 15, designated as "Specifications of Objections to Findings of Fact and Order Allowing Claim Filed by George T. Goggin, as Receiver Herein", has been omitted from your Certificate on Review.

No doubt you will recall that in the courtroom of Judge Mathes on March 18, 1948, I requested an extension of the usual time within which specifications of objections to proposed findings should be filed, because of being involved in the then pending and complicated legal matters. As I understood your Honor, the findings as submitted by Mr. Steinmeyer were to be held so that I would have an opportunity to file my specifications. Upon examining the record, I find that the findings as submitted by Mr. Steinmeyer and the conclusions and order were signed by yourself on March 22, 1948, and, there is a separate notation on the specifications to the effect that they were denied as of March 23, 1948, the date on which they were filed.

I have spoken to Mr. Steinmeyer concerning this proposed request that the Certificate on Review be supplemented by forwarding the specifications of objections, and, as I understand it, Mr. Steinmeyer has no objection to this procedure.

In the presentation of the review to the District Judge, the filing of objections to the proposed findings may become a matter of inquiry, and, therefore, it would appear necessary to protect the rights of the Receiver by having the specifications of objections as part of the record before the District Judge.

Your cooperation in this matter would be appreciated.

Respectfully yours,

/s/ MARTIN GENDEL.

mg;ma cc: Hugo A. Steinmeyer, Esq. [101]

[Endorsed]: Filed April 20, 1948.

[Title of District Court and Cause.]

SPECIFICATIONS OF OBJECTIONS TO
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER ALLOWING CLAIM

Comes now George T. Goggin, as receiver herein, and through his counsel, in objection to the findings of fact, conclusions of law, and order allowing claim, makes the following specifications:

I.

On page 2, lines 11 to 16, the sentence contained therein should be rephrased to read as follows:

“The parties having stipulated to the facts involved in the said petitions by an oral stipula-

tion in the Jacques Power Saw matter, and a stipulation in writing filed in the subsequent objection proceedings and the cause having been argued by respective counsel and submitted to the Referee, and the Referee being fully advised in the premises having made and filed a 'Memorandum Opinion on Claim of Bank of America';"

II.

The sentence at lines 28 to 29 on page 2, should be stricken, reading as follows: [102]

"It is not true that said claim is a contingent claim."

When the claim was filed, neither the collections nor the valuation of the real property secured had been determined, and obviously the claim was contingent.

III.

In paragraph III, page 3, line 21, the words "most of" should be inserted after the word "mentioned", and at line 23 a comma should be inserted after the word "collection" and the words "when collected" should be inserted before the word "and".

IV.

In paragraph IV the word "cash" should be inserted in line 5, before the word "balances".

V.

Paragraphs V and VI, in their entirety, are not supported by any evidence introduced in the hearings.

VI.

In paragraph VIII, on page 8, at line 30, there should be inserted the following clause, after the

word "debtor", which word should be followed by a semi-colon:

"however, no credit had been extended in reliance upon said collection items, and no part thereof had been collected on August 20, 1947, when the receiver demanded the return of the collection items."

VII.

Obviously, it is difficult for counsel for the receiver to urge suggested changes in the conclusions of law and order, for the reason that we are convinced that the recognizable weight of authority is contrary to the position of the bank. We therefore shall not seek to affect the conclusions of law and order of this Court, believing that the matters involved therein will ultimately be determined on appeal. However, it may be of assistance [103] to this Court to point out that the receiver and the Bank of America have agreed that the amount to be allocated to the release of the real property, and the improvements thereon, shall be the sum of \$250,000.00.

Wherefore, the receiver herein respectfully prays that the within specifications of objections to the findings of fact, conclusions of law and order allowing claim, be adopted by this Court.

GEORGE T. GOGGIN,

Receiver.

By /s/ MARTIN GENDEL,

Of Counsel for Receiver.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 20, 1948. [104]

[Title of District Court and Cause.]

HEARING ON ORDER TO SHOW CAUSE ON BANK OF AMERICA

The following is a stenographic transcript of the proceedings had in the above entitled cause, which came on for hearing before the Honorable Hugh L. Dickson, Referee in Bankruptcy, at his courtroom, 343 Federal Building, Los Angeles, California, at 2:30 p.m., on Tuesday, December 2, 1947.

Appearances: Martin Gendel, Esq., appearing on behalf of the Receiver, George T. Goggin. Hugo A. Steinmeyer, Esq., appearing on behalf of the Bank of America. [94]

* * * *

Mr. Gendel: It would be stipulated as follows:

That the Debtor herein in 1946 entered into a sizable lending transaction with the Bank of America in excess of \$500,000. That during the year 1946 the average on collections made by the Bank of America on behalf of the Debtor was \$40,000 to \$50,000. That there was apparently an implied understanding between the Bank of America and the Debtor corporation that all of the usual banking transactions would be handled through the Bank of America and the deviations from that were minor and only for reasons of convenience with the knowledge and consent of the bank and the implied understanding included that as to collections or notes or sight drafts or bills of lading that they would be handled through the collection department of the Bank of America.

That on or about July 8, 1947, the Debtor deposited

with the Bank of America for collection a note payable by the Jacques Power Saw Company of Denison, Texas, to the Debtor corporation, the proceeds of which when obtained to be deposited in their regular commercial account. This note was due and payable on July 16, 1947 in the face amount of \$35,837. That on or about June 30, 1947, the Debtor corporation had issued on its books but had not apparently completed carrying forward a credit memorandum of \$1,163.50, which credit memo was issued to [95] cover undelivered items which had originally been included in the amount reflected by the note. So that the actual amount owing on that note was \$34,653.50. That the Bank of America forwarded the note for collection to a bank in Denison, Texas. That payment on that note was originally refused by the payer and the note was returned to the Bank of America on or about July 31, or August 1, 1947, as uncollected, and the Debtor was so informed. On or about August 1, 1947, the Debtor again redeposited the note for collection and it was again forwarded to the Denison bank for payment.

Mr. Steinmeyer: Just at that point if I may interrupt. The note was not delivered by the bank to the Debtor. It was received by the bank and then the Debtor gave you instructions to the bank to resubmit it again to the maker.

Mr. Gendel: I think that is correct. We will so stipulate. That is, that the note physically didn't leave the bank; it came back to the bank. Conversation was had with the Debtor and then the bank was instructed to forward it again for collection. That on August 19, 1947, the bank shut off all credits or

allowances to the Debtor to draw on any of the funds in the Bank of America.

Mr. Steinmeyer: That was on the afternoon of August 19.

Mr. Gendel: The afternoon of August 19, at the close of business, the bank shut off any right on behalf of the [96] Debtor to draw on any of its funds. Then on August 20, 1947 the Debtor filed its petition for reorganization before this Court. That on August 21, 1947 there was delivered to the Bank of America the original of this notice advising that authority to collect on the particular note in question had been terminated and we have stipulated, your Honor, that this copy may be introduced as part of the stipulation of facts on behalf of the Receiver, showing that on or about August 22, 1947 the Bank of America authorized its forwarding bank to allow the credit claim of \$1,163.50.

Mr. Steinmeyer: May I interrupt there. I think that the correct statement there is that on or about August 22, 1947 the Debtor agreed with the maker of the note that the credit of \$1,163.50 would be allowed on the note and attempted to collect the money direct from the maker of the note.

Mr. Gendel: Yes; that is substantially correct, and I think in addition thereto we should stipulate that the Bank of America authorized the forwarding bank to accept the lesser sum.

Mr. Steinmeyer: That is correct.

Mr. Gendel: That on or about August 25 or August 26, 1947 the money on the note, the net

amount of \$34,653.50 was paid to the forwarding bank and the receipt of the money at the Bank of America appears to have been acknowledged [97] on August 27, 1947.

It is further stipulated that at no time was the Debtor given credit in its bank account or bank dealings with the Bank of America to draw on this particular note.

Mr. Steinmeyer: Or any item given for collection until it was collected.

Mr. Gendel: Or any item that was handled by the bank customarily for collection until the item had actually been collected by the bank and then deposited in its commercial account.

The Referee: In other words, no advance credit was given to depositors of this note?

Mr. Gendel: That is correct. Now, is there anything further, Mr. Steinmeyer, that you think we should add to our stipulation?

Mr. Steinmeyer: Yes, I think there is, Mr. Gendel. After the happening on August 19, 1947, I think there should be added to your statement the fact that the company, that is, the Debtor, advised the bank after the close of business on August 19 that it proposed to file a Chapter XI petition on August 20, and when the bank received that advice it then terminated the credit.

Mr. Gendel: We will so stipulate.

Mr. Steinmeyer: One other fact, that I think should be amplified a bit from your statement, and

that is that [98] the Bank of America handled the collection of all commercial items for the Debtor starting in June of 1946 at the time of the extension of credit and that those collections averaged from \$40,000 to \$50,000 per month during the year 1946, and during the year 1947 up to the date of filing the bankruptcy petition, averaged approximately \$150,000 per month.

Mr. Gendel: Yes, we will so stipulate.

Mr. Steinmeyer: Now we will stipulate to those facts for the purpose only of this proceeding to determine, that is to permit the Court to determine whether or not there is a color of title in the bank on this objection to this petition. [99]

State of California,
County of Los Angeles—ss.

I, P. A. Duran, Acting Official Reporter, do hereby certify that the foregoing six (6) pages comprise a true and correct transcript of a portion of the proceedings had in the above entitled matter.

Dated this third day of December, 1947.

/s/ P. A. DURAN,
Acting Official Reporter.

[Endorsed]: Filed Dec. 5, 1947. [100]

In the District Court of the United States, Southern
District of California, Central Division

No. 45,207-B

In the Matter of SALSURY MOTORS, INC., a
corporation, Debtor.

ORDER DENYING PETITION FOR REVIEW
IN RE BANK OF AMERICA—BANKER'S
LIEN LITIGATION

George T. Goggin, as Receiver, heretofore filed objections to the claim of the Bank of America National Trust & Savings Association, and prayer for affirmative relief; after full hearing at which evidence was presented and argument by counsel, the Honorable Hugh L. Dickson, Referee, made findings of fact and conclusions of law and, on March 22, 1948, entered an order overruling the objections of the Receiver and denying the Receiver's prayer for affirmative relief; thereafter, the petition for review of the said order was duly filed and prosecuted by George T. Goggin, as Receiver; Points and Authorities were submitted by the Bank of America National Trust & Savings Association and George T. Goggin; said findings of fact, conclusions of law and points and authorities were fully considered by the undersigned Judge of the United States District Court; the undersigned Judge of the United States District Court being in agreement with the said [106] Referee as to all findings of fact and conclusions of law neces-

sary for the disposition of the matter before the Court; the matter having been taken under submission and having been duly considered,

It Is Now Ordered that the objections of George T. Goggin, as Receiver, be overruled and the order of the said Referee, Honorable Hugh L. Dickson, affirmed, and that this Court hereby confirms, approves and adopts the Findings of Fact and Conclusions of Law of said Referee.

Dated this 19th day of January, 1949.

/s/ C. E. BEAUMONT,
Judge of the United States District Court.

Approved as to form only.

/s/ MARTIN GENDEL,
Of Counsel for George T. Goggin as Receiver.

Judgment entered Jan. 19, 1949. Docketed Jan. 19, 1949, Book 55, Page 292.

EDMUND L. SMITH,
Clerk,

By /s/ C. A. SIMMONS,
Deputy.

[Endorsed]: Filed Jan. 19, 1949. [107]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above Entitled Court:

Notice Is Hereby Given that George T. Goggin, as receiver of the above named debtor, hereby appeals to the United States Court of Appeals, for the Ninth Circuit, from the Order Denying Petition for Review in re Bank of America—Banker's Lien Litigation entered in this Court on January 19, 1949, Judgment Book 55, at page 292, and from the whole thereof.

Dated February 1, 1949.

GENDEL & CHICHESTER,

By /s/ MARTIN GENDEL,

Of Counsel for George T. Goggin, Receiver and Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 2, 1949. [108]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

George T. Goggin, receiver of the above named debtor, through his counsel, hereby designates the entire record before the District Court, including all the papers, pleadings, and evidence certified to the District Court by the Honorable Hugh L. Dickson, Referee in Bankruptcy, with his Certificate on Re-

view from his order of March 22, 1948, denying objections of the appellant to the claim of the Bank of America National Trust & Savings Association, and denying the appellant's prayer for affirmative relief.

Pursuant to the provisions of Rule 75(o) of the Rules of Civil Procedure for the United States District Court and pursuant to Rule 11 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended, request is hereby made that the Clerk of the above entitled Court transmit all the original papers in the file dealing with the action or the proceeding in which the appeal has been taken, including the notice of appeal and this [110] designation.

Dated at Los Angeles, California, this 1st day of February, 1949.

GENDEL & CHICHESTER,

By /s/ MARTIN GENDEL,

Of Counsel for Appellant George T. Goggin, Receiver.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 2, 1949. [111]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 112, inclusive, contain full, true and correct copies of Petition of Debtor Under Chap-

ter XI of the Bankruptcy Act and Approval of Debtor's Petition and Order of Reference Under Section 322 of the Bankruptcy Act and the original Referee's Certificate on Review; Proof of Partially Secured Debt; Petition for Order to Show Cause Against Bank of America re Jacques Power Saw Co.; Order to Show Cause re Bank of America National Trust & Savings Association; Objections of Bank of America, etc., to Jurisdiction of the Court in a Summary Proceeding against said Bank Relating to a Controversy Concerning the Lien and Right of Offset of the Bank on a Promissory Note and the Proceeds Received in Payment Thereof; Memorandum Opinion; Objections to Claim of Bank of America National Trust & Savings Association and Prayer for Affirmative Relief; Notice of Hearing on Objections to Claim of Bank of America National Trust & Savings Association and Prayer by Receiver for Affirmative Relief; Answer of Bank of America National Trust and Savings Association to Objections to Claim and Prayer for Affirmative Relief; Overruling Objections to Jurisdiction and Consolidating Proceedings; Stipulation; Memorandum Opinion on Claim of Bank of America; Petition for Review of Referee's Order of March 22, 1948 Allowing the Claim of Bank of America; Transcript of Hearing on Order to Show Cause on Bank of America; Letter dated April 16, 1948 to Referee Dickson from Martin Gendel; Specifications of Objections to Findings of Fact, Conclusions of Law and Order Allowing Claim; Order Denying Petition for Review in Re Bank of America Banker's Lien Litigation; Notice of Appeal and Designation of Record on Appeal which con-

stitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 10th day of March, A.D. 1949.

(Seal)

EDMUND L. SMITH,
Clerk.

[Endorsed]: No. 12206. United States Court of Appeals for the Ninth Circuit. George T. Goggin, Receiver of the Estate of Salsbury Motors, Inc., Appellant, vs. Bank of America National Trust & Savings Association, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 11, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12206

GEORGE T. GOGGIN, Receiver of Salsbury
Motors, Inc., a corporation, Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION, a National Bank-
ing Association,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Appellant, George T. Goggin, Receiver of Salsbury Motors, Inc., a corporation, debtor, intends to rely on appeal on the following points:

1. The District Court and the Referee erred in overruling the objections of the Receiver-Appellant to the claim of the Bank of America National Trust and Savings Association.

2. The District Court and the Referee erred in denying the Receiver-Appellant's petition for Order to Show Cause against the Bank of America National Trust & Savings Association in re Jacques Power Saw Co.

3. The District Court and the Referee erred in overruling the Receiver-Appellant's prayer for af-

firmative relief against the Bank of America National Trust & Savings Association.

4. The District Court and the Referee erred in allowing the claim of the Bank of America National Trust & Savings Association.

5. The District Court and the Referee made Findings of Fact which were clearly erroneous in that said Findings of Fact were not supported by substantial evidence and were contrary to the evidence.

6. The District Court and the Referee adopted erroneous Conclusions of Law which were and are contrary to the laws of the State of California and contrary to controlling decisions of the United States Supreme Court.

Dated March 18, 1949.

GENDEL & CHICHESTER,

By /s/ MARTIN GENDEL,

Of Counsel for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Mar. 19, 1949. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
TO BE PRINTED

Appellant, George T. Goggin, Receiver of Salisbury Motors, Inc., a corporation, debtor, hereby designates the entire record and all the proceedings and evidence certified to the Clerk of this Court by the Clerk of the District Court in connection with the within appeal as material to the consideration of the appeal and appellant hereby requests that the entire record and all the proceedings and evidence be printed.

Dated March 18, 1949.

GENDEL & CHICHESTER,
By /s/ MARTIN GENDEL,
Of Counsel for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Mar. 19, 1949. Paul P. O'Brien,
Clerk.

No. 12206.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Receiver of the Estate of SALSBUURY
MOTORS, INC., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS AS-
SOCIATION,

Appellee.

APPELLANT'S OPENING BRIEF.

GENDEL & CHICHESTER and
BERNARD SHAPIRO,

810 Oviatt Building, Los Angeles 14,

*Of Counsel for Appellant George T. Goggin, Receiver
of the Estate of Salsbury Motors, Inc., Debtor.*

FILED

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No. 12206.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Receiver of the Estate of SALSURY
MOTORS, INC., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS AS-
SOCIATION,

Appellee.

APPELLANT'S OPENING BRIEF.

I.

JURISDICTIONAL STATEMENTS.

1. The District Court Had Jurisdiction of This Cause.

As a court of bankruptcy, the United States District Court had jurisdiction of this cause pursuant to the Act of July 1, 1898, as amended. (Chapter 541, Sections 1 and 2, 30 Stat. 544, 545, as amended; United States Code, Title XI, Chapter 1, Section 1, and Chapter 2, Section 11.) On August 20, 1947, the debtor (hereinafter referred to as "Salsbury") filed a petition under Chapter XI of the Bankruptcy Act in this proceeding. [Tr. 2-7.] On the same day the petition was approved by the Honorable Leon R. Yankwich, Judge of the United States District Court, and the matter was referred to Hugh L. Dickson,

Esq., one of the Referees of said Court. [Tr. 7-8.] On November 20, 1947, the appellant Receiver filed a PETITION FOR ORDER TO SHOW CAUSE RE: JACQUES POWER SAW Co. [Tr. 37-30.] On September 9, 1947, appellee, Bank of America National Trust and Savings Association (hereinafter referred to as "Bank" or "Bank of America"), filed a proof of partially secured debt. [Tr. 13-36.] On December 2, 1947, the Bank filed written objections to the jurisdiction of the Referee to entertain said petition. [Tr. 40-43.] On December 22, 1947, appellant Receiver filed OBJECTIONS TO CLAIM OF THE BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, AND PRAYER FOR AFFIRMATIVE RELIEF. [Tr. 48-57.] On January 12, 1948, the Referee below overruled the Bank's objections to the jurisdiction of said Referee to determine the PETITION FOR ORDER TO SHOW CAUSE RE: JACQUES POWER SAW Co. [Tr. 67], and pursuant to stipulation of counsel for Receiver and the Bank an order was signed and filed consolidating said PETITION FOR ORDER TO SHOW CAUSE RE: JACQUES POWER SAW Co. and said OBJECTIONS TO CLAIM OF THE BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, AND PRAYER FOR AFFIRMATIVE RELIEF, for all purposes of hearing and decision. [Tr. 67-68.] Said stipulation for consolidation also contained a stipulation of facts for all purposes of hearing and decision of said consolidated proceedings, and said stipulation was filed on January 12, 1948. [Tr. 68-77.] On or about March 22, 1948, the Referee below filed Findings of Fact, Conclusions of Law and an Order Allowing the Claim of appellee Bank. [Tr. 80-92.] The Referee [Tr. 10], states that this was signed and filed on March 22, 1948, but the Transcript on page 92 indicates that it was filed on March 16, 1948. A petition to re-

view said order allowing claim was duly filed by Receiver appellant. [Tr. 93-99.] On January 19, 1949, the United States District Court, through the Honorable C. E. Beaumont, filed an ORDER DENYING PETITION FOR REVIEW IN RE BANK OF AMERICA—BANKERS' LIEN LITIGATION. [Tr. 109-110.]

2. The Court of Appeals Has Jurisdiction of This Appeal.

Within the time allowed by law, your appellant filed a notice of appeal [Tr. 111] and has taken the steps required by law presenting the necessary record on the within appeal.

The jurisdiction of the Court of Appeals is invoked pursuant to Sections 24 and 25 of the Bankruptcy Act (Act of July 1, 1898, as amended, Chapter 541, Sections 24 and 25; 30 Stat. 533, as amended; United States Code, Title XI, Chapter 4, Sections 47 and 48). Appellate jurisdiction over this proceeding in bankruptcy vested in the Court of Appeals upon the filing on February 2, 1949, of the notice of appeal, the amount involved being in excess of \$500.00, and the appeal being taken by the Receiver.

II.

STATEMENT OF THE CASE.

This appeal is from an order of the District Court entitled, "ORDER DENYING PETITION FOR REVIEW IN RE BANK OF AMERICA—BANKER'S LIEN LITIGATION," dated and entered on January 19, 1949. [Tr. 109-110.] That order in turn approves the order of the Referee in Bankruptcy dated March 22, 1948. [Tr. 91-92.]

The facts in this case are largely to be found in a stipulation by and between the appellant and the Bank, through

their respective counsel, which stipulation was before the Referee and the District Court below. [Tr. 68-77.] According to that stipulation, the claimant Bank loaned Salsbury, debtor herein, the sum of \$180,000.00, which loan was secured by a deed of trust on certain real property; the plant of Salsbury was located on that property. The deed of trust by its very terms was to secure the repayment of the \$180,000.00 and any other indebtedness of Salsbury to the Bank, whether then existing or thereafter created. At the same time the Bank entered into an agreement with Salsbury by the terms of which the Bank agreed to extend credit to Salsbury in the aggregate sum of \$500,000.00, to be repayable in annual installments on or before September 30, 1950. Subsequently (September 3, 1946) this agreement was amended so that the Bank agreed to increase the credit by an additional revolving credit not to exceed \$450,000.00, until September 30, 1947. [Tr. 69.]

Pursuant to this credit agreement, the Bank loaned Salsbury, an aggregate amount in excess of \$600,000.00. From the time of the agreement, the Salsbury regularly maintained its major deposit accounts with the Bank as a bank of deposit. During this same period, Salsbury also deposited with the Bank, for collection only, notes and drafts accompanied by order bills of lading evidencing sales of merchandise by Salsbury. In the regular course of business these notes and drafts were collected and the proceeds credited to the Salsbury's commercial account. From June of 1946 until December of 1946, these collection items deposited with the Bank averaged from \$40,000 to \$50,000 per month, and during the year 1947 up to August 20, 1947 (the date of the filing of the petition herein), these collection items so deposited with the Bank

averaged approximately \$150,000.00 per month. [Tr. 70.]

On August 19, 1947 (Salsbury informed the Bank on the day before the filing of the petition herein), Salsbury was in default in the payment of its indebtedness to the Bank, and on that day the Bank offset the balance of various deposit accounts of Salsbury in the aggregate amount of \$161,125.55 and refused to allow withdrawals. Taking into account this offset, there was due and unpaid on account of the indebtedness of the Salsbury to the Bank, the principal sum of \$601,482.80. [Tr. 70.]

On the date of the filing of the petition herein, August 20, 1947, the Bank held in its custody certain notes and drafts drawn upon drawee purchasers in amounts set forth in the Transcript herein at pages 54 and 55 [Exhibit A to appellant's OBJECTIONS TO CLAIM OF THE BANK OF AMERICA etc.], totaling \$178,950.93. The Bank of America likewise held order bills of lading representing the right to receive merchandise described therein, which merchandise was in the course of shipment to the various drawee purchasers. [Tr. 71.]

Subsequent to August 20, 1947, the Bank collected substantially all of the totals represented by said bills of lading except for certain rejected drafts, more fully described in the stipulation. [Paragraph IV, Tr. 71-74.]

Among the collection items in the possession of the Bank at the time of the filing of the petition herein was a promissory note executed by the Jacques Power Saw Co. of Denison, Texas, payable to the debtor in the principal amount of \$35,837.00 on July 16, 1947. That note was deposited with the Bank by Salsbury on or about July 8, 1947, pursuant to the usual agreement for collection,

only, and was transmitted to the correspondent of the Bank of America in Denison, Texas. Payment of this note was refused and the note was returned to Bank of America on or about July 31, 1947. On or about August 1, 1947, the Bank informed Salsbury that this note had been returned, and Salsbury instructed the Bank to re-submit the note for collection. There had been certain undelivered items mistakenly included in the amount of the note and Salsbury had issued on its books a credit memorandum of \$1,163.50 to the Jacques Power Saw Co. On August 21, 1947, Salsbury delivered to the Bank the following letter:

“August 21, 1947.

Bank of America National
Trust and Savings Association
Pomona, California.

Attn: Mr. Farrand

Gentlemen:

On July 8, 1947, we deposited with you for collection a promissory note on which Jacques Power Saw Company of Denison, Texas, was the payor and Salsbury Motors, Inc., was the payee. The note was due July 16, 1947, and was in the principal amount of \$35,837.00.

Please be advised that your authority to collect said note is hereby terminated, effective immediately. Collection will be effected by direct dealings between ourselves and Jacques Power Saw Company.

Very truly yours,

SALSBURY MOTORS, INC.

/s/ G. R. CASE,

General Manager.”

[Tr. 74-75.]

On or about August 22, 1947, Salsbury agreed with the maker of the note that the credit memorandum of \$1,-163.50 was a proper credit on the note. The Bank, however, failed to recognize the termination of authority and on or about August 25, 1947, the maker of the note paid the net amount of \$34,653.50 to Bank of America's correspondent bank in Denison, Texas, upon surrender of the note. These funds were received by Bank of America on or about August 27, 1947. [Tr. 75-76.]

In addition to the foregoing facts, the parties hereto had also stipulated to the following [Tr. 76]:

“VI.

None of the notes and drafts or bills of lading accompanying the same deposited by the debtor with claimant as collection items during the course of the operation of the business of the debtor from the time of the loan agreement on February 18, 1946, to the date of filing the petition in the above-entitled proceedings was at any time pledged by the debtor to secure any indebtedness of the debtor to claimant. No immediate credit was given by claimant to the deposit accounts of the debtor upon the deposit of any of said collection items but all of said items were deposited with claimant for collection and credit of the proceeds of the collection to the deposit account of the debtor when said collections were completed. During the period from February 18, 1946, to August 19, 1947, claimant did, in the usual course of business, credit to the deposit account of the debtor, as and when received, the proceeds of all collection items in accordance with the instructions of the debtor. In each of the collection items in the hands of claimant on August 20, 1947, the debtor had issued and claimant had accepted instructions to credit the proceeds of said collections when received to the commercial deposit account of the debtor.”

The Bank refused to turn over to Salsbury any of the notes, drafts or collection items hereinbefore referred to, or the proceeds thereof, and on or about September 9, 1947, the Bank duly filed its proof of claim against the estate of Salsbury in the principal sum of \$601,482.80, together with interest thereon as set forth in said claim. [Tr. 77; 13-36.] On November 20, 1947, Salsbury filed a PETITION FOR ORDER TO SHOW CAUSE AGAINST BANK OF AMERICA RE: JACQUES POWER SAW Co. in the Bankruptcy Court, stating the facts with respect to said note, already set forth herein, and requesting an order directing the Bank to show cause why the Bankruptcy Court should not make an order forthwith directing Bank of America to pay the sum of \$34,673.50 to the Receiver. [Tr. 37-39.] An order to show cause was issued thereon on the same day [Tr. 39-40] and on December 2, 1947, the Bank filed its objections to the summary judgment of the Bankruptcy Court. [Tr. 40-43.] The Referee below filed a memorandum opinion on December 8, 1947, indicating that the Bank's objections to the summary jurisdiction were overruled, holding that the Bank had only a colorable claim, and was not a bona fide adverse claimant. [Tr. 44-47.]

On December 22, 1947, the appellant Receiver also filed OBJECTIONS TO CLAIM OF THE BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION AND PRAYER FOR AFFIRMATIVE RELIEF, in which the Receiver contended that Salsbury was the owner of the negotiable paper in the custody of the Bank at the time of the filing of the petitions, and that Salsbury was further entitled to the

physical, as well as legal, possession of this paper. At the same time, the Receiver prayed for an order sustaining his objections to the claims of the Bank, and for an affirmative order directing the Bank to forthwith turn over to the Receiver the sum of \$178,950.93. [Tr. 48-57.] The Bank filed an answer to the objections of the Receiver on January 12, 1948. [Tr. 58-66.] On the same day the Referee overruled the Bank's objections to the summary jurisdiction of the Bankruptcy Court and ordered that the PETITION FOR ORDER TO SHOW CAUSE AGAINST BANK OF AMERICA RE: JACQUES POWER SAW Co. be consolidated by stipulation [Tr. 68-69], with the above described OBJECTIONS TO CLAIM OF THE BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION AND PRAYER FOR AFFIRMATIVE RELIEF for all purposes of hearing and decision. [Tr. 67-68.] The stipulation of facts [Tr. 68-77] referred to in this brief was also filed on January 12, 1948.

On March 4, 1948, the Referee filed a memorandum opinion with respect to the claim of the Bank of America, in which he stated that under Section 3054 of the Civil Code of California, the Bank was entitled to a lien upon the negotiable paper placed in the custody of the Bank by Salsbury for the purposes of collection, and that the Bank was therefore entitled to retain the money which it collected upon that commercial paper. [Tr. 78-80.] FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ALLOWING THE CLAIM were thereupon filed on March 22, 1948 [Tr. 80-92.]

A petition for a review was duly filed in the District Court [Tr. 93-99], and said District Court, through the Honorable C. E. Beaumont, denied the petition for review by an order dated January 19, 1949. [Tr. 109-110.] Notice of Appeal from that order was filed by your appellant [Tr. 111] and all other steps were taken to perfect the appeal. [Tr. 111-117.] The ORDER DENYING PETITION FOR REVIEW IN RE BANK OF AMERICA—BANKER'S LIEN LITIGATION [Tr. 109-110] from which this appeal was taken "confirms, approves and adopts the Findings of Fact and Conclusions of Law" of the Referee below. [Tr. 110.] A reading of the Referee's MEMORANDUM OPINION ON CLAIM OF BANK OF AMERICA [Tr. 78-80] and his FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ALLOWING CLAIM [Tr. 80-92] reveals that the rulings and orders below are based upon the applicability of the so-called banker's lien to the facts of the present case.

The appellant receiver contends, in summary, that the Bank had only mere limited custody rights as to the notes and drafts. The Bank was an agent and possession and ownership remained in Salsbury until collection was effected and the proceeds deposited in Salsbury's regular commercial account. The notes and drafts in question had not been collected in any amount when the petition herein was filed and no credit had been extended thereon by the Bank. The Bank converted the notes and drafts to its own use and is therefore indebted to this estate in the amount of the face value of the notes, *i. e.*, \$178,950.93.

III.

SPECIFICATION OF ERRORS.

The Order Denying Petition for Review In re Bank of America—Banker's Lien Litigation [Tr. pp. 109-110] Is Erroneous in That:

1. THERE WERE NO FACTS BEFORE THE REFEREE OR THE DISTRICT JUDGE TO JUSTIFY THE RETENTION BY THE BANK OF SALSBURY'S NOTES AND DRAFTS OR THE PROCEEDS THEREOF UPON ANY THEORY OF SET-OFF AND THE RETENTION WAS PARTICULARLY UNJUSTIFIED UNDER SECTION 68(a) OF THE BANKRUPTCY ACT.

2. THERE WERE NO FACTS BEFORE THE REFEREE OR THE DISTRICT JUDGE WHICH WOULD JUSTIFY THE RETENTION BY THE BANK OF SALSBURY'S NOTES AND DRAFTS OR PROCEEDS THEREOF, UPON THE THEORY OF A BANKER'S LIEN.

IV.

SUMMARY OF ARGUMENT.

A. THE BANK WAS NOT ENTITLED TO RETAIN THE NOTES AND DRAFTS UNDER ANY THEORY OF SET-OFF AND PARTICULARLY COULD NOT JUSTIFY ITS POSITION UNDER SECTION 68(a) OF THE BANKRUPTCY ACT.

1. THE RIGHTS OF CREDITORS ARE FROZEN AS OF THE DATE OF THE FILING OF THE PETITION FOR ARRANGEMENT AND THE RELATIONSHIP OF THE BANK TO THE APPELLANT MUST BE DETERMINED AS OF THAT DATE. AS OF THE DATE OF THE FILING OF THE PETITION HEREIN (AUGUST 20, 1947), THE BANK AND SALSBUURY OCCUPIED THE RELATIONSHIP OF AGENT AND PRINCIPAL, RESPECTIVELY, AS TO THE NOTES AND DRAFTS BELONGING TO SALSBUURY AND HELD BY THE BANK FOR COLLECTION ONLY.

B. THE APPELLEE CANNOT JUSTIFY ITS SEIZURE OF THE NOTES AND DRAFTS UNDER THE BANKER'S LIEN SET FORTH IN SECTION 3054 OF THE CIVIL CODE OF CALIFORNIA.

1. SECTION 3054 OF THE CALIFORNIA CIVIL CODE MERELY RESTATES THE LAW MERCHANT WHICH IMPOSED THE REQUIREMENT THAT A BANK EXTEND CREDIT UPON THE FAITH OF COMMERCIAL PAPER AS A CONDITION PRECEDENT TO ACQUISITION BY THE BANK OF A LIEN UPON SUCH PAPER.

2. THE CALIFORNIA COURTS AND THE COURTS GENERALLY PERMIT A BANK TO EXERCISE A LIEN UPON COMMERCIAL PAPER DEPOSITED WITH THE BANK FOR COLLECTION ONLY WHERE THE BANK HAS EXTENDED CREDIT UPON THE FAITH OF SUCH PAPER.

3. THE PURPORTED APPLICATION HEREIN OF THE BANKER'S LIEN IS CONTRARY TO THE SPIRIT OF THE BANKRUPTCY ACT AND PARTICULARLY OFFENSIVE TO A PROCEEDING UNDER CHAPTER XI.

V.

ARGUMENT.

Introduction.

The instant appeal raises questions of extreme importance to the administration of the bankruptcy laws. Here is a case in which a corporation borrowed large sums of money from a bank, these loans partially secured by a trust deed. Salsbury, the corporation, maintained a deposit account with this bank, appellee Bank of America, and in addition transmitted to the Bank large amounts of commercial paper in the form of notes and drafts accompanied by order bills of lading evidencing sales of merchandise by Salsbury. These notes were to be collected by the Bank and the proceeds of such collections were to be deposited in Salsbury's regular deposit account. Salsbury filed a petition under Chapter XI of the Bankruptcy Act on August 20, 1947. The day before that petition was filed, the Bank off-set the deposit account of Salsbury in the aggregate amount of \$161,125.55. The Bank also retained its security in the form of a trust deed, as additional security for its loan. After August 19, 1947, Salsbury was unable to draw upon its credit at the Bank. Despite this, the Bank nevertheless asserted a purported lien (or right of set-off, in the alternative) upon the notes and drafts belonging to Salsbury and totaling \$178,950.93. This lien or right of set-off, was asserted by the Bank after the filing of the petition in reorganization, after the demand by Salsbury for the return of the notes, after the cessation of general

credit by the appellee Bank, and at a time when the Bank had extended no credit in reliance upon the notes.

Salsbury, seeking rehabilitation, found itself in a most unenviable position. The Bank, owing to Salsbury's default, claimed a right to Salsbury's real property under the deed of trust which secured the indebtedness; the Bank had wiped out Salsbury's cash position by setting off the bank deposit; it had appropriated the only other ready source of funds available to Salsbury by the assertion of the purported banker's lien or right of set-off upon Salsbury's notes and drafts transmitted to the bank for collection.

In these consolidated proceedings, the appellant receiver has attacked the conversion by the Bank of the debtor's negotiable paper. The Bank first resisted on the ground of lack of summary jurisdiction, but that point will not be discussed herein because the Referee below ruled in favor of the jurisdiction of the Bankruptcy Court, adversely to the Bank and the Bank does not seek review. It is further notable that the Referee below, and the District Judge, likewise, presumably rejected one of the Bank's arguments on the merits, that is, the alleged right of the Bank to "set off" the notes and drafts in its possession against the debt of Salsbury. [Tr. 88-90.] As a matter of fact, the Bank seems to have abandoned this contention as untenable. The Bank's other argument on the merits was accepted by the Courts below; namely, that under Section 3054 of the California Civil Code, the Bank was entitled to exercise a so-called banker's lien

upon the notes and drafts in its custody for collection only, but which, notes and drafts belonged to the debtor.

Appellant will address himself in this brief to both of the Bank's arguments on the merits; however, special emphasis will be placed upon arguments pertaining to the banker's lien. In that regard, appellant stresses that the Bank extended no credit upon the faith of the Salsbury's notes and drafts in the custody of the Bank for purposes of collection. Thus, no lien extended to the Bank either under the general commercial law or under the California Civil Code, Section 3054, which is a codification of that law. More than that, such a lien would be a rejection of the equitable principles governing bankruptcy proceedings including proceedings under Chapter XI of the Bankruptcy Act.

A. The Bank Was Not Entitled to Retain the Notes and Drafts Under Any Theory of Set-Off and Particularly Could Not Justify Its Position Under Section 68(a) of the Bankruptcy Act.

- (1) The Rights of Creditors Are Frozen as of the Date of the Filing of the Reorganization Petition and the Relationship of the Bank to the Appellant Must Be Determined as of That Date. As of the Date of the Filing of the Petition Herein (August 20, 1947), the Bank and Salsbury Occupied the Relationship of Agent and Principal, Respectively, as to the Notes and Drafts Belonging to Salsbury and Held by the Bank for Collection, Only.**

With respect to the notes and drafts involved herein, the respective rights of the parties must be determined as of the date of the filing of the reorganization petition, that is, August 20, 1947.

"The general rule in bankruptcy is that the filing of the petition freezes the right of all parties interested in the bankrupt estate."¹

Section 68(a) of the Bankruptcy Act provides as follows:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

The rights of the parties under Section 68 are subject to the foregoing rules and are adjusted as of the date of bankruptcy; in the case of a petition filed under Chapter XI, the date of cleavage is the date of the filing of the petition for arrangement.²

¹4 Collier on Bankruptcy (14th Ed.), 228.

See, also, *Goggin v. Division of Labor Law Enforcement, State of California* (1948), 336 U. S. 118, at pp. 125-126:

"This general point of view in interpreting the Bankruptcy Act is one of long standing. In *Everett v. Judson*, 228 U. S. 474, 479, this Court said:

'We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.'

"See also, *Myers v. Matley*, 318 U. S. 622, 626; *United States v. Marxen*, 307 U. S. 200, 207-208; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 307."

In *United States v. Marxen* (1939), 307 U. S. 200, at 207-208, the Court stated:

"... the rights of creditors are fixed by the Bankruptcy Act as of the filing of the petition in bankruptcy. . . . The transfer of the assets to someone for application to 'the debts of the insolvent, as the rights and priorities of creditors may be made to appear,' takes place as of that time."

²*Lockhart v. Garden City Bank & Trust Co.* (C. C. A. 2d, 1940), 116 F. 2d 658; see also 4 Collier on Bankruptcy (14th Ed.), 743.

As of the date of cleavage, August 20, 1947, the relationship between Salsbury and the Bank herein was that of principal and agent. It is well established that when notes are placed in the hands of a bank for collection, and the bank does not advance credit on the notes, the bank takes the notes as an agent only and the owner is the principal of the bank with respect to those notes.³ The California courts recognize this accepted principle of law. For example, in *National Bank of New Zealand v. Finn* (1927), 81 Cal. App. 317, at 336, the Court states in its opinion:

“ . . . The law seems to be well-settled that if a check for bill of exchange is taken for collection only by a bank, the bank does not take title, but acts merely as a collection agent and that the property in the check or draft remains in the depository (*sic*) and that the relation arising from the transaction is not that of debtor and creditor but that of principal and agent.”

Thus, at the time of cleavage, the Bank of America held certain property in the form of notes and drafts belonging to Salsbury, the Bank's principal. In addition, shortly thereafter and before collection of the notes and drafts, the principal ordered the agent to return the property; this the agent refused to do in violation of its agency and proceeded in an unauthorized manner to convert the notes and drafts to its own use and to collect the amounts represented by those notes and drafts. Under California law, the Bank could acquire no property in the notes and drafts until they had been reduced to the form of a deposit

³⁶ Michie (1931), Banks & Banking, at p. 19, and cases there cited.

in the name of the debtor.⁴ By that time the petition herein was filed and the authority of the agent had been countermanded.

Accordingly, no mutual debts existed for set-off purposes with respect to the notes and drafts.⁵

⁴*Powell v. Bank of America* (1942), 53 Cal. App. 2d 458, at p. 464.

⁵Since the notes and drafts were held by the Bank as agent at the date of cleavage, there could be no mutual debts or mutual credits within the meaning of Section 68(a) of the Bankruptcy Act. The notes and drafts were obligations owing by third parties to Salsbury; the Bank had custody of these instruments and proceeded deliberately in an attempt to convert that mere custody to an ownership under the guise of a purported deposit of the subsequent collection.

The Bank could claim the right to set-off on only two conceivable grounds: either that the moneys collected on the notes and drafts are to be considered deposits and therefore subject to set-off against the debt owing to the Bank or that the notes and drafts themselves constituted a proper subject of set-off. The first theory is clearly untenable since deposits made after the filing of the reorganization petition cannot be subjected to any purported right of set-off.[4 Collier on Bankruptcy (14th Ed.), 772-775. See also discussion in *In re Susquehanna Chemical Corporation* (1949, D. C., Pa.), 81 Fed. Supp. 1, at pp. 8-9, affirmed in *Susquehanna Chemical Corp. v. Producers Bank & Trust Co.* (April 27, 1949, C. A. 3), C. C. H. Bankruptcy Law Service, par. 56,415.]

The contention that the Bank could set-off the notes and drafts themselves is equally unsound. These notes and drafts were not owing by the Bank to Salsbury. They were evidences of indebtedness, choses in action, negotiable in form, owing by third persons to Salsbury. They were held by the Bank as mere agent for Salsbury and should either have been returned to the latter or if collected, deposited in the name of Salsbury in the form of a deposit subsequent to the filing of the reorganization petition and therefore not subject to any doctrine of set-off. Even *funds* held by the Bank could not be set-off if such funds were held by the Bank as a bailee for the debtor. That point was clearly decided by this Court in *Continental National Bank v. Moore* (1924, C. C. A. 9), 299 Fed. 270, at 272. In that case, the opinion of this Court stated:

"The money so deposited and the debt due from the bankrupt to the bank were not in the nature of 'mutual credits' and 'debts,' within the meaning of section 68a of the Bankruptcy Act (Comp. St. §9652). The right of set-off attached upon the moneys of a customer deposited with a bank 'in the

B. The Appellee Cannot Justify Its Seizure of the Notes and Drafts Under the Banker's Lien Set Forth in Section 3054 of the Civil Code of California.

The Referee and District Court below relied upon the purported banker's lien, under the laws of the State of

usual course of business for advances which are supposed to be made upon their credit.' Michie, Banks and Banking, §134. As to the fund which represented the proceeds of the bankrupt's business, the relation between the appellant and the bankrupt was not that of banker and depositor, but that of bailee and bailor. The statute of California (Civil Code, §3054) relied upon by the appellant is but expressive of the law merchant, and does not affect the situation. As to the funds so placed in the control of the bank it is well settled that there was no right of set-off. *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769; *Alvord v. Ryan*, 212 Fed. 83, 128 C. C. A. 539; *Lehigh Valley Coal Sales Co. v. Maguire*, 251 Fed. 581, 163 C. C. A. 575; *First Nat. Bank v. Harper*, 254 Fed. 641, 166 C. C. A. 139." [See also *Matter of Autler* (D. C. N. Y., 1938), 23 Fed. Supp. 756.]

The rules applicable to bailees, so far as set-off is concerned, are equally applicable to an agent holding a note for collection. The law in this regard has been summarized in 7 Zollman (1936), *Law of Banks and Banking*, at pp. 21-22, in the following language:

"It is clear, indeed, that the mere possession of notes by a bank without ownership will not constitute them a mutual credit . . .

"Nor will the fact that notes have been received for collection, or the payment of creditors, or are owned by the president of the bank, having been assigned to him by the predecessor bank, or have been executed by the testator while the deposit is by his executor, change the situation." (See also *Federal Reserve Bank of Richmond v. Early* (C. C. A. 4, 1929), 30 F. 2d 198, at 202.

The very wording of Section 68(a) requires that the debts and credits be "mutual" in order for set-off to apply. It is, of course, not always a simple matter to reconcile the vast number of cases dealing with the principle of set-off, particularly where there is a variance from the basic situation of a creditor bank holding a general deposit in the name of the bankrupt.

(See discussion in 7 Zollman (1936), *Law of Banks and Banking*, at pp. 12, 17-18, 19.)

The appellee Bank, in the instant case, for example, placed considerable reliance in the courts below upon the case of *Half Moon Fruit & Produce Co. v. Floyd* (C. C. A. 9, 1932), 60 F. 2d 799,

California, as the ground for permitting the Bank to retain the notes and drafts belonging to Salsbury. Sec-

where a produce company advanced moneys to a grower upon the express agreement that the grower would turn over his products to the produce company and that the produce company would sell the products and repay those advances out of the first moneys received by it. Pursuant to this agreement the grower sent melons to the produce company and the latter sold the melons and retained the proceeds. The sale of the melons by the produce company was completed by November 11, 1929, and the petition in bankruptcy of the grower was filed on November 25, 1929. This Court held that no preference occurred and that the produce company was entitled to retain the proceeds from the sale of the melons. The appellee Bank, in the instant case, contends that certain dicta in the *Half Moon* supports its position regarding set-off, but it is clear that the produce company extended credit upon the melons (a fact of considerable importance in the later banker's lien section of this brief) and the transaction was wholly completed before the filing of the petition in bankruptcy.

Where there is clearly no mutuality, that is, where the party seeking to apply a set-off has no mutual debt or credit to apply to the debt owing to him by the opposite party, but has property in his custody which he holds in a fiduciary capacity (*e.g.*, as an agent), there is no basis for set-off either under the language of the Bankruptcy Act or under the very reasoning which gave rise to that doctrine. This was precisely the point, as we understand it, in the above quoted *Continental National Bank* case. (This lack of mutuality was further discussed in a more recent case, *United States v. Roth* (C. C. A. 2, 1948), 164 F. 2d 575, at p. 578.)

If the Bank is to assert any right at all to the notes and drafts in its custody as an agent, which notes and drafts belonged to Salsbury, it must base its claim upon some theory of lien. The Bank is, upon analysis, asserting a right as against the notes and drafts themselves; a right which would empower the Bank of America to seize those instruments, collect the amounts owing upon them, and then apply those amounts to the satisfaction of its claim against the debtor. (*Matter of Autler* [D. C. N. Y., 1938], 23 Fed. Supp. 756.) Once the Bank closed the deposit account of Salsbury (as it did on August 19, 1947 [Tr. 70]), no further deposits could have been subject to set-off; any deposit after the Bank forbade payment of checks would have been a payment and a preference. (*Mechanics' and Metals Nat'l Bank of the City of New York v. Ernst* (1913), 231 U. S. 60; *Bank of Commerce and Trusts v. Hatcher* (C. C. A. 4th, 1931), 50 F. 2d 719.)

See, also, *Bank of Calif. v. Brainard* (C. C. A. 9, 1925), 3 F. 2d 3, 5; *Union Bank & Trust Co. v. Loble* (C. C. A. 9, 1927), 20 F. 2d 124; *First Nat. Bk. of Kansas City v. Seldomridge* (C. C. A. 8, 1921), 271 Fed. 561; *Rupp v. Commerce T. & S. Bank* (C. C. A. 6, 1929), 32 F. 2d 234.

tion 3054 of the Civil Code of California provides as follows:

“§3054. BANKER'S LIEN.—A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business.”

The Referee below expressly stated that he believed that the

“true answer to the question is to be found in the case of *Gonsalves v. Bank of America*, 16 Cal. (2d) 169 (1940), where at page 173 the Court said:

‘To understand this exercise of the bank’s right it is necessary to state briefly its nature. Section 3054 of the Civil Code provides: “A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business.” The banker’s lien described in this statute is, properly speaking, a lien on the *securities* such as commercial paper deposited with the bank by the customer in the course of business. The so-called “lien” of the bank on the depositor’s *account* or funds on deposit is not technically a lien, for the bank is the owner of the funds and the debtor of the depositor, and the bank cannot have a lien on its own property. The right of the bank to charge the depositor’s fund with his matured indebtedness is more correctly termed a right of setoff, based upon general principles of equity. (See *Pendleton v. Hell-*

man Commercial T. & S. Bank, 58 Cal. App. 448 (208 Pac. 702); 11 Cal. L. Rev. 111, 112; 7 Cal. L. Rev. 341; 38 Harv. L. Rev. 800; Brown on Personal Property, p. 519.)' " [Tr. 78-79.]

It is the purpose of appellant, in the following sections of this brief, to demonstrate that a bank does not have a lien upon securities in its custody where the securities are held for collection only and where no credit was advanced by the bank upon the faith of those securities. The California court, in its above quoted dictum in the *Gonsalves* case, was merely stating the rule pertaining to banker's lien in its most general form. The *Gonsalves* case actually involved the following situation: The defendant bank obtained a deficiency judgment against the plaintiff and filed suit to collect such a deficiency but failed to serve a summons in that action. Several years later the plaintiff was informed by the defendant that a deposit of plaintiff's in defendant's bank was being appropriated under the bank's right of set-off. Plaintiff attempted to withdraw his deposit but the bank refused to honor his check. Plaintiff thereupon brought an action to recover the amount of the deposit; meanwhile, plaintiff caused defendant's earlier action to be dismissed under Sec. 581a of the California Code of Civil Procedure on the ground that the summons had not been served and returned within three years of the filing of the action. In the proceeding brought by Gonsalves, as plaintiff, against the bank, the trial court rendered judgment for the plaintiff upon the ground that since the three year

period under Sec. 581 C. C. P. had run on the bank's original action, no cause of action existed in favor of the bank (defendant) upon which any right of set-off could be exercised. It was this ruling that was reversed by the Supreme Court of California. The plaintiff contended on appeal, in support of the judgment in its favor below, that the bank's set-off was in the nature of a counter-claim and must therefore conform to the procedural requirement for the pleading of a counter-claim by a defendant in a pending action. In reply to this argument of the plaintiff, the Court made the introductory statements relied upon by the Referee herein and went on to state that the right of set-off, although not technically a lien, was nevertheless similar to a lien in its enforcement. That is, the bank could enforce the set-off without the aid of a Court. Therefore, the plaintiff in the *Gonsalves* case was wrong on two counts: first, Sec. 581a is not a statute setting up a statute of limitation, and second, the right of set-off is exercisable without respect to pending actions.

The California court was not purporting to rule upon the requirements of a banker's lien; the Court was merely making a statement introductory to an explanation of the right of set-off. There is no California case holding that a banker's lien may be asserted upon securities held by the bank for collection only, upon which no credit has been extended. Indeed, it will be shown herein that the holdings of the California cases are in opposite direction.

1. Section 3054 of the California Code Merely Restates the Law Merchant Which Imposed the Requirement That a Bank Extend Credit Upon the Faith of Commercial Paper as a Condition Precedent to Acquisition by the Bank of a Lien Upon Such Paper.

California Civil Code Section 3054, when enacted, was merely reflective of the already existing law pertaining to banker's liens. This fact should be subject to no dispute, and has been recognized by this Honorable Court as well as by the Courts of the State of California.⁶ Section 3054 has never been amended. When it was originally enacted in 1872, the Code Commissioners annotated the section by citing five cases.⁷ In order that there may be a unified picture of the state of the law, as conceived by the California Code Commissioners at the time of the enactment of the pertinent code section, it is necessary to separately study the particular cases cited by them.

The banker's lien apparently originated from the practice wherein banks discounted bills of exchange for mer-

⁶" . . . The banker's lien referred to in Section 3054 of the Civil Code, was familiar, as a part of the law, long before the enactment of the Codes. Section 3054 does not extend its scope . . ." *Berry v. Bank of Bakersfield* (1918), 177 Cal. 206, at 209.

" . . . This is but a restatement of a well-known rule of commercial law . . ." *Arnold v. San Ramon Valley Bank* (1921), 184 Cal. 632, at 635.

" . . . The statute of California (Civil Code, Sec. 3054) relied upon by the appellant is but expressive of the law merchant, and does not affect the situation . . ." *Continental Nat. Bank v. Moore* (C. C. A. 9th, 1924), 299 Fed. 270, at 272.

⁷"NOTE—*Davis v. Bowsher*, 5 T. R., p. 488; see *Brandao v. Burnett*, 3 C. B., p. 519; rev'g S. C., 6 M. & G., p. 630; and affirming S. C., 1 M. & G., p. 908; *Bank of Metropolis v. New England Bank*, 1 How. U. S., p. 234; 6 *Id.*, p. 212; *Van Amee v. Bank of Troy*, 8 Barb., p. 312; 5 How. Pr., p. 161; *McBride v. Farmers' Bank*, 25 Barb., p. 657; 26 N. Y., p. 450." (2 Civil Code of the State of California [1872], p. 315.)

On page vi of the Preface to the foregoing Code, the Code Commissioners explain at length that the object of such "Notes" is to "explain the *reason* and *intent* of the law." (Commissioners' *italics*.)

chants and thereby extended credit on the bills. Either the banks owned these bills or they were protected by a banker's lien for the advances made on the bills.⁸ If, on

⁸Early English cases so indicate. For example, in *Giles v. Perkins* (1807), 9 East. 11, 103 English Reports 477, the plaintiffs were depositors and the defendants were bankers. The plaintiffs deposited bills of exchange with defendants and the latter went bankrupt at a time when the balance was in favor of the plaintiffs. The bills in dispute were not due when they were deposited. The defendants stated nevertheless, when the plaintiffs sued to recover the bills or their amounts, that banks considered such bills as their own because they had extended credit upon them. The Court held that the plaintiffs could recover the amounts of the bills:

"Lord Ellenborough, C. J. Every man who pays bills not then due into the hands of his banker places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it pro tanto for his advance. The only difference between the practice stated of London and country bankers in this respect is, that the former, if overdrawn, has a lien on the bill deposited with him, though not endorsed; whereas the country banker who always takes the bill endorsed, has not only a lien on it, if his account be overdrawn, but has also his legal remedy upon the bill by the indorsement; but neither of them can have any lien on such bills until their account be overdrawn; and here the balance of the cash account at the time of the bankruptcy was in favour of the plaintiffs." (103 Eng. Rep. at p. 478.)

In a later case, *Thompson v. Giles* (1824), 2 B. & C. 422, 107 English Reports 441, the plaintiff was a silk manufacturer who kept a banking account with the defendants who went bankrupt. When the paper involved in the case was deposited, the bank gave the customer credit to draw upon irrespective of the due date of the bills. The cash balance at the time of the bankruptcy was in favor of the plaintiff. Here, again, the Court was urged to consider the paper as owned by the bank on the basis of custom. Holroyd, J., made the following statement for the Court:

"I am of opinion that the bills in question did not, under the circumstances of this case, become the property of the bankers, and that the defendants, therefore, have not any sufficient answer to this action. It is perfectly clear, as a general rule, and indeed is not disputed on the present occasion, that if a customer pay bills into a banker's hands, although it gives him a right to expect that his draft will be honoured to the amount of the bills paid in, yet the property in the bills is not altered; they still remain the property of the customer, although the banker may have a lien to the extent of his advances." (107 Eng. Rep. at pp. 444-445.)

the other hand, items were merely placed in the custody of the bank, without any extension of credit thereon, the bank was deemed not to have possession in the legal sense; and the bank could not claim a banker's lien on such items. The lien, therefore, was (and still is) in the nature of an implied pledge.⁹

The English case of *Brandao v. Barnett* has often been cited as a leading authority and was recognized as such

⁹In *Davis v. Bowsher* (1794), 5 T. R. 488, 101 English Reports 275 (cited by the Code Commissioners, see footnote 7, above), a customer maintained a general account in commercial bills with his banker and received credit thereon. The bank extended credit as desired and discounted such of the bills deposited as most nearly approximated the sum advanced. Some of the bills were not discounted but the bank finally refused further credit and retained all of the bills to protect itself in the event that "any of the discounted bills should prove bad" since some were not yet due. The Court held that the bank was entitled to hold the bills to protect itself since credit had been extended upon the whole account; certain bills had been discounted merely for convenience, not for the purpose of signifying reliance on them alone. Manifestly, the credit was extended on the faith of the entire account and the reporter summed up the Court's holding in the following words:

"A customer lodges bills of exchange in the hands of his banker generally, and when the banker advances money to him, he applies it to the discount of such bills as happen to be nearest in value to the sum advanced, but without any special agreement to that effect. This does not invalidate the banker's general lien upon all the other bills in his hands, but he may retain them in order to secure the payment of his general balance." (101 Eng. Rep. 275.)

If the *Davis* case is compared to the present case where no credit was extended upon the basis of the notes and drafts in the hands of appellee, the inapplicability of the banker's lien here is effectively highlighted. According to the theory of appellee, the banker's lien is a purely mechanical devise; if property belonging to the debtor is in the hands of the banker, the latter may seize it under the alleged lien without more. As the *Davis* case shows, and as will become more evident from the cases yet to be cited, no such inequitable preference was ever contemplated.

On the other hand, another English case cited by the Commissioners (see footnote 7, above) is *Brandao v. Barnett* (1846), 3 C.

by the California Code Commissioners.¹⁰ In likening the lien to an implied pledge and in asserting that the lien must attach when the bank acquires custody of the items, the English Court illustrates the indispensable nature of the requirement that there be an extension of credit. The lien was held not to arise when certain exchequer bills were placed in the hands of the bank because there had been no credit advanced upon them and no facts analogous to an implied pledge. The *Brandao* case is a flat rejection of appellee's theory that the banker's lien arises upon the mere fact of a debt plus property of the customer in the custody of the bank.

B. 519, 136 English Reports 207, where exchequer bills were placed in the custody of a bank under lock and key. Either the bank or the customer collected the interest, or exchanged the bills in the event that new ones were issued by the government. The bank attempted to assert its lien upon these bills on the ground that the interest on the bills went to the credit of the customer; and upon the further ground that the bank from time to time actually took the bills out of the box and collected the interest or even exchanged the bills. The bills had remained in the banker's hands at one period for a longer time than usual because of the illness of the customer. At the outset, the English court took judicial notice of the banker's lien. Nevertheless, it held that this lien was inapplicable in the case then before it. The Court (136 English Reports 212) stated that, "the right acquired by a general lien, is that of an implied pledge . . ." Following this, the opinion of the Court contains a most revealing statement:

"Nor can it make any difference, that on the particular occasion out of which this action originated, on account of the illness of Burn, so long a time had elapsed from the obtaining of the securities without their being demanded by him for the purpose of being locked up in the tin box; for, if the defendants had not a right of lien upon them the moment they obtained them, the actual lien clearly could not afterward be claimed, when Burn's account had been overdrawn." (136 Eng. Rep. at p. 213.)

¹⁰Footnote 7 herein, and discussed at length in footnote 9, above.

The United States cases cited by the Code Commissioners commence with *Bank of Metropolis v. New England Bank* (1843), 1 How. (42 U. S.) 234, which represents a much litigated matter arising upon the following facts: The plaintiff (New England Bank) indorsed certain paper to the Commonwealth Bank for collection and the Commonwealth Bank sent the paper on for collection to the defendant Bank of Metropolis. The defendant Bank of Metropolis had a corresponding relationship with the Commonwealth Bank and they had mutual balances, sometimes in favor of one and sometimes in favor of the other. The New England Bank brought an action to recover the amount of the bills and notes in question after the Commonwealth Bank became insolvent. The Supreme Court, in reversing a judgment for plaintiff found that the notes appeared to be the *prima facie* property of the Commonwealth Bank, and held that without further notice to the contrary, the defendant Bank of Metropolis had the right so to treat them. The Court placed emphasis upon the extension of credit by the defendant bank and remanded the case to the Federal trial court where the case was tried before a jury. On the second appeal to the Supreme Court, Chief Justice Taney gave crystal clear treatment to our instant issue.¹¹ There the Supreme Court of the United States took the unusual step of setting forth sample instructions upon the further remand of the case. These instructions are of extreme importance, not only because of their application to the banker's lien generally, but they take on added significance since this case was also cited by the California Code Commissioners. We take the

¹¹*Bank of Metropolis v. New England Bank* (1848), 6 How. (47 U. S.) 212.

liberty of setting forth instruction number 2 in the language of the Supreme Court:

“2. And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners, unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands to be met by the negotiable paper transmitted or expected to be transmitted in the usual course of dealings between the two banks.” (6 How. at p. 227.)

These two cases amply demonstrate the basis of the banker's lien. They clearly set forth the requirement that there must be an advance of credit upon the notes. In the instant case it is stipulated that no such credit was extended. The other two cases cited by the Code Commissioners support this contention.

In *Van Amee v. Bank of Troy* (1850), 8 Barb. 312, 5 How. Pr. 161, the plaintiff deposited a note for collection in the Canal Bank. The Canal Bank in turn transferred it to the defendant bank for collection and subsequently the Canal Bank failed before the maturity of the particular note but while it owed the defendant bank a balance. The defendant bank thereupon claimed the note under its right of lien and the plaintiff sued for the return of the note or its proceeds. It was held that the defendant bank had no right under the banker's lien. The New York Court, in reviewing the authorities, was faced with the holding of the *Brandao* case and the *Bank of Metropolis* case to the effect that the lien may exist if the depositor or forwarding bank holds out the note as its own. The Court nevertheless ruled that banks take so many notes for collection (with no passage of title) that

the collecting bank should have been on notice that the Canal Bank might not have owned the paper. The result of this reasoning led the Court to the conclusion that *the defendant bank could not, therefore, have relied upon these notes as security for advances or for a balance.*

The Court then went on to state:

“ . . . But what seems wholly inconsistent with any implied contract for a lien, on every Monday all balances were paid up. This note was in the hands of the defendants between three and four weeks before the Canal Bank failed; and consequently the two banks cleared all accounts two or three times during that. And had not the Canal Bank failed, they would have settled and paid all up on both sides, probably, many times before this note became due. This wholly repels the idea of any contract for a lien, express or implied.” (8 Barb. at pp. 321-322.)

The last case cited by the Code Commissioners is *McBride v. Farmers' Bank of Salem* (1857), 25 Barb. 657. That case is similar in effect to the *Van Amee* case and also involved Canal Bank. The plaintiff had sent certain notes to the Canal Bank for collection and credit. The Canal Bank sent the notes to the defendant bank for collection and subsequently, the Canal Bank failed, owing the defendant bank money. The plaintiff sued to recover the note or the proceeds thereof. Defendant bank asserted a right of lien. The defendant bank contended that it believed that the Canal Bank owned the note. The New York Court expressly treated this allegation of the defendant bank as true. Nevertheless the Court refused to allow the defendant bank its right of lien. In so deciding, the Court made the following statement:

“ . . . But there is no pretense that the defendant ever parted with any thing, gave any credit, relin-

quished any security, or assumed any burthen or responsibility on the face of these notes. The evidence is that it did not.” (25 Barb. 657, at p. 659.)

These, then, are the cases cited by those who recommended the adoption of the code section upon which appellee and the Courts below relied. They deal with many different types of situations; they deal with individuals as against banks and with banks against banks. They furnish, in themselves, a complete picture of the birth and growth of the concept of the banker's lien and they touch upon a myriad of situations in which that lien may or may not be applied. But in viewing the concept of the banker's lien as developed therein, one fact becomes inescapably clear. That is, there can be no lien unless there has been an extension of credit upon the faith of the notes upon which the lien is to attach. Cases dealing specifically with a banker's lien emphatically demonstrate that an indispensable requisite to the lien is such an advancement of credit or of money.

The dictum from the *Gonsalves* opinion relied upon by the Courts below in the instant case, therefore, cannot reasonably be interpreted as contradictory of the cases cited by the Code Commissioners or an overruling of California cases which have delineated the right of bankers, since 1872, under the Civil Code Section 3054. Although there is no California case precisely upon the facts stated in the instant case, there are cases to be cited in this brief which compel the conclusion that the bank's position (that is, the banker's lien applies if the customer owes the bank money and the bank has custody of any property of the customer's) is wholly unsound. Not only is that position unsound in view of the authorities, it is equally unsound when exposed to the light of reason. The banker's lien is in the nature of an im-

plied pledge, according to the *Brandao* case.¹² A lien must have some basis in equity and in policy. If a bank has not extended credit upon the faith of certain notes, how can it be said that the bank, in equity, is entitled to any lien upon those notes? The answer is, that the bank is not entitled to such a lien but on the contrary, such a purported lien would in truth be an outright preference.

2. The California Courts and Courts Generally Permit a Bank to Exercise a Lien Upon Commercial Paper Deposited With the Bank for Collection Only Where the Bank Has Extended Credit Upon the Faith of Such Paper.

As stated earlier in this brief, the banker's lien arose in order to protect a bank in situations where a depositor delivered considerable negotiable paper to the bank for discount or other forms of credit. The amounts involved often bore no relationship to the amounts actually collected on the paper, because the face amounts of such paper were not necessarily due and collectible at the time of the deposit. But if no credit were advanced upon the faith of the paper, no lien arose and there was no occasion to apply the rule of "implied pledge" discussed in the famous case of *Brandao v. Burnett*.¹³

The rule of the English cases is reflected in the law of this country, not only as stated in the cases cited by the Code Commissioners in the preceding section of this brief, but in many other cases as well. The Illinois Supreme Court, in an early leading case, stated, "Here, then, is the true principle upon which this, as well as other bankers' liens must be sustained, if at all. There must be a credit given upon the credit of the securities,

¹²Footnote 7, above.

¹³See discussion in footnote 9, *supra*.

either in possession or in expectancy.” (*Russell v. Had-duck* (1846), 8 Ill. 237, at p. 242.) The Illinois Court strongly reaffirmed this doctrine in *Niblack v. Park Nat. Bank* (1897), 169 Ill. 517. There X (bank) drew a check on the defendant bank, payable to the plaintiff. X bank had ample funds on deposit for the payment of the check, but the defendant bank also had a demand note of X bank’s in excess of the amount of the check. The plaintiff presented the check for payment after the defendant bank had closed its doors. The question was whether the plaintiff could force payment by the defendant out of the X bank’s deposits. The Court held that plaintiff could recover and that neither the rules concerning set-off or banker’s lien could apply to the case, stating: “ ‘In the very nature of such transactions a banker’s lien cannot extend to the money left on deposit with him, according to the customs and usages of banks. It has never been so extended, but is confined to securities and valuables which may be in the banker’s custody as collaterals. The credit must be given on the credit of the securities or valuables, either in possession or expectancy. This is the extent of a banker’s lien . . . ’ ”¹⁴

¹⁴169 Ill. at p. 521.

See, also, *National Bank v. Insurance Co.* (1881), 104 U. S. 54, at p. 71, and *Reynes v. Dumont* (1889), 130 U. S. 354, at p. 391, where the Supreme Court states that a banker’s lien ordinarily “attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit.” An advance would be “supposed” to be made upon the credit of certain securities deposited with the bank where there had been some history of advancement of credit upon the faith of such notes. In the instant case it is stipulated that no credit was extended upon the faith of these securities and the history of the dealings between Salsbury and the appellee herein amply demonstrates that no credit in fact had ever been extended. On the contrary, the collections were made available to the debtor only after they had actually been placed in a deposit in the debtor’s name.

The *Niblack* case was recently cited with approval by the Florida Supreme Court in *Everglades Cypress Co. v. Tunncliffe* (1933), 107 Fla. 675, at p. 679. The bank in that case had claimed the right to certain deposits either under set-off or under lien. The Court held that set-off did not apply and that, of course, the banker's lien did not apply to deposits. In so holding, the Court stated:

“ . . . A lien arises from contracts or from operation of law. It does not by the customs and usages of banks extend to the moneys left on deposit with them. The banker's lien is confined to the securities and properties which have been placed in the bank's custody as collateral and its credit is extended on the strength of such collateral.”¹⁵

¹⁵The appellee herein, Bank of America, placed reliance in the Courts below upon *dicta* contained in *Kane v. First National Bank of El Paso* (C. C. A. 5th, 1932), 56 F. 2d 534. The *Kane* case was decided upon facts dissimilar to the instant case. The *dicta* in that case lend general support to the view of the appellee herein; nevertheless, the *Kane* case can be reconciled with the overwhelming authority on the subject of banker's lien in the light of its distinguishable facts: In the first place, the third party checks involved in the *Kane* case were *deposited in the account of the customer*; second, the checks were collected by the bank and the money seized on May 22, 1929 and the bankruptcy there involved did not commence until August 3, 1929; third, limited credit was extended by the bank on the deposit of these checks, as illustrated by the following statement in the Court's opinion (56 F. 2d at p. 535): “ . . . Each check was on an out-of-town bank, and was received under a special agreement for collection, but entered as a credit on the bankrupt's account . . . ”

Thus, although the bank did not allow credit to the full amount of these checks, some credit was allowed and, in fact, *an overdraft occurred but for the deposited checks*. (56 F. 2d at p. 535). Viewed in this light, the *holding* of the *Kane* case is consonant with established law, although the *dictum* contained therein is not. In Vol. 9 of *Corpus Juris Secundum*, at p. 520 we find the erroneous *dicta* of the *Kane* case used as authority for a statement appearing to favor the position of the Bank,

The California courts, to the knowledge of appellant, have never passed directly upon the question involved in the instant case. The California cases clearly indicate, however, that the rules theretofore discussed with respect to the limitations upon the banker's lien apply in California. In *Berry v. The Bank of Bakersfield* (1918), 177 Cal. 206, a depositor sued a bank to recover a stock certificate deposited with the bank as security for the payment of a note executed by the depositor to the bank. The depositor subsequently borrowed an additional amount from the bank, and still later tendered the balance due upon the first note and requested that the bank surrender the stock certificate. The bank refused to do so, contending that by virtue of the banker's lien, it had the right to retain the stock certificate as security for the payment of the second note. The Court found that there had been no agreement that the stock certificate should be held or pledged for the second note and that therefore it must be returned to the depositor, stating:

“If, under the contract of the parties, the certificate was pledged as security, simply, for the fourteen thousand dollar note, the defendant was not entitled to hold it, under its alleged banker's lien, to secure another obligation. The banker's lien referred to in section 3054 of the Civil Code, was familiar, as a part of the law, long before the enactment of the codes. Section 3054 does not extend its scope. It has always been the rule that a banker holding se-

curities pledged for the payment of a particular debt has no lien upon them for the payment of other claims.”¹⁶

¹⁶177 Cal. at p. 209.

The Supreme Court of the United States had previously announced a similar rule in *Hanover National Bank v. Suddath* (1909), 215 U. S. 110, where a bank refused to extend credit upon negotiable paper placed by plaintiff with the bank for collection; subsequently, and while the bank held that paper, the bank allowed an overdraft in favor of plaintiff and upon discovering this fact wrote a letter to plaintiff stating that the credit had been extended upon the negotiable paper as collateral. The Supreme Court held that the plaintiff could recover the securities or the value thereof *and that the bank had no lien thereon*. The Court obviously deemed that notes in the custody of a bank for collection only are in such custody for a special purpose and not amenable to the banker's lien. This is illustrated by the Court's citation of *Biebinger v. Continental Bank* (1878), 99 U. S. 143, as authority for its denial of the lien. In the *Biebinger* case the plaintiff deposited with the defendant bank a note (of a third person) secured by a mortgage as security for the debt of plaintiff to the bank. Later, plaintiff withdrew the note and mortgage in order to collect the amount represented thereby, agreeing to replace them. As a replacement, plaintiff subsequently deposited with the bank a deed to the mortgaged property. Plaintiff finally paid off its indebtedness to the bank but did not regain possession of the deed; after this, plaintiff again became indebted to the bank and upon plaintiff's bankruptcy the bank claimed a lien upon the deed for the amount of the indebtedness. The Supreme Court held that the bank was not entitled to a lien.

See *Bank of Montreal v. White* (1880), 154 U. S. 660, also cited by the Court the *Suddath* case as authority for denial of the lien, where in a very short opinion the Supreme Court also held that a bank had no lien upon a note in the custody of the bank because the bank had refused to discount the note and consequently there was no evidence that the note was taken as security for past or future indebtedness.

In the instant case it is stipulated that the notes were taken for collection only and that no credit was advanced thereon.

Thus, the mere physical custody of the bank is not sufficient to warrant the indiscriminate application of its purported banker's lien.¹⁷

The California cases, by and large, are far more concerned with the right of set-off by the bank than they are with the banker's lien. There are no California cases

¹⁷In *Della v. The Home Bank of Porterville* (1930), 105 Cal. App. 106, at p. 110, where the Court held that the bank could not exercise its lien upon a sum of money received by the bank for the sale of a certain chattel belonging to the depositor, because the sale of the chattel to the bank was in violation of Section 3440 of the California Civil Code. Thus, although the money belonged to the depositor, the Court insisted that the bank hold it in trust for the benefit of the creditors of the depositor and without benefit of the banker's lien.

The *Della* case again emphasizes the rule that where the bank has mere custody, instead of the legal possession required by C. C. 3054 and the cases describing the banker's lien, the bank has no right to convert the property of the customer to its own use under the alleged cover of such lien.

For a further example, see *Powell v. Bank of America* (1942), 53 Cal. App. 2d 458 (previously cited herein at footnote 4), where the defendant bank was held liable for the conversion of moneys, the bank obtained custody of the funds under instructions to deliver them to an individual against whom the bank held a judgment unenforceable because of the statute of limitations. The Court stressed the fact that the person to whom the funds were payable was not a customer of the bank and, at 53 Cal. App. 2d at page 463, discussed the bank's duty and position as an *agent*. The bank in the *Powell* case attempted to assert a lien but the Court refused to allow it.

Similarly, in *Anglo-Californian Bank v. Grangers' Bank* (1883), 63 Cal. 359, the depositor owned shares of stock in the depository bank; the depositor sold his shares but the bank refused to allow a transfer to the purchaser until certain indebtedness of the depositor to the bank had been satisfied. The Supreme Court held that the lien under Section 3054 did not apply and reversed the trial Court, stating (63 Cal. at p. 364):

"... The defendant was not in possession of the shares for which Fowler held the certificate, and such shares being his personal property, the defendant had no general lien upon it for any balance which might be due it from Fowler in the course of business. (Civ. Code Sec. 3054.) . . ."

indicating that the California rules governing the application of the lien are in any way different from those rules established under the law merchant. Indeed, as it has been shown herein by the citations from California cases, and from the discussion of the cases cited by the California Code Commissioners, it is clear beyond doubt that the California rule does not differ from the historic rule applicable to the banker's lien. Studied in this light, it is at once apparent that the dictum in the *Gonsalves* case, so strongly urged by appellee and by the courts below was merely an attempt to distinguish between set-off and the banker's lien.¹⁸

The general rule, then, is that securities placed in the custody of a bank for collection only are not subject to the so-called banker's lien unless the bank has extended credit in reliance upon the securities.¹⁹ The Bank in the

¹⁸See *American Surety Co. v. Bank of Italy* (1923), 63 Cal. App. 149, for a case in which the right of set-off was confused with the banker's lien as set forth in C. C. C. §3054.

¹⁹See, Wayne L. Townsend, *Bank Deposits of Commercial Paper*, 7 N. Y. Univ. Law Quar'ly Rev. 293, 618 at pp. 319-320:

"The difference in the probative value of the fact of drawing when the question in dispute is ownership of the deposited item and when the controversy involves a lien upon an admitted collection item is apparent. In the former case, the matter of ownership is almost universally settled without reference to the amount which depositor has drawn; if a debtor and creditor relation is found to have been established, the bank is complete owner of the instrument, handles it as its own property and is entitled to the whole of the proceeds. In the latter case, the extent of the bank's interest depends entirely upon a showing of the amounts which have been drawn on the strength of the item; it stands in the position of a pledgee with collateral in his hands; it has the 'special property' of a pledgee in, or a banker's lien upon, the item, while the 'beneficial ownership' remains with the depositor."

instant case was a mere custodian and acquired no possession, in the legal sense, such as would entitle it to exert a lien upon the notes and drafts belonging to Salsbury.²⁰

²⁰The appellee Bank's position herein, that it is entitled to the lien upon the mere facts of custody and indebtedness, collapses in the light of the many cases cited herein where such facts existed but no lien was allowed. But before closing this section of his brief, appellant respectfully invites the attention of this Honorable Court to other cases denying to banks the right of lien where the banks had bare custody only:

In re Cummins Construction Corporation (1947, D. C. Md.), 72 Fed. Supp. 409. There, the bankrupt owed money to two banks on certain notes. One of the banks had previously lent money on a certain government contract and had taken an assignment of the government payments. Later, the government loan was paid off but the assignment had not been cancelled. After the loan had been paid off, the government continued to send the checks to the bank and the bank applied those checks on the other indebtedness of the customer, having already set-off money on deposit. Adjudication of bankruptcy followed these actions of the bank and the trustee entered into a compromise with the bank whereby the trustee was to receive the part of the government check appropriated by the bank. This compromise was before the District Court on the request of the creditors. Compromise held valid. The Court stated that the creditors and the trustee are in agreement that the amount appropriated by the bank from the government check must be returned on the ground that it was a voidable preference. The bank had asserted a banker's lien upon the check, but the Court held that the banker's lien could not apply. Affirmed on appeal, *Hughes & Co. v. Machen* (1947, C. C. A. 4), 164 F. 2d 983. The Court on appeal merely assumed as obvious the fact that the bank had no right to the government check under a lien theory. It is clear from the case, that the advances of the bank based upon these government checks had been paid off by the debtor (bank's customer).

Moore v. Third National Bank (1910), 41 Pa. Sup. Ct. 497. There the bank accepted a check for collection only but bankruptcy intervened prior to collection. The Court stated (41 Pa. Sup. Ct. at pp. 502-503):

“... The deposit of these checks was not a deposit of money; the bank took the checks for collection only; it advanced no money upon them and parted with nothing upon the faith of the deposit; it was not the holder of the checks for value . . .”

3. **The Purported Application of the Banker's Lien Herein Is Contrary to the Spirit and Purposes of the Bankruptcy Act and Particularly Offensive to a Proceeding Under Chapter XI Thereof.**

Assuming the application of the banker's lien by the courts below is not compelled by California Civil Code, Section 3054, there is still another ground for reversal. The seizure by the Bank of Salsbury's commercial paper in its hands for collection only could have no effect except to thwart the desirable end sought in a Chapter XI proceeding. This is particularly true where, as here, the same creditor had already seized the cash in Salsbury's bank account and claimed the right to Salsbury's real property as security for the debt.

The following general and well accepted distinctions between an average bankruptcy proceeding and a proceeding under Chapter XI have been set forth in 8 Collier on Bankruptcy (14th Ed.), at p. 20:

"In the ordinary bankruptcy proceedings under Chapters I to VII of the Act, the estate is administered for the purposes of liquidation and distribution. The trustee is required to collect and reduce to money the property of the estate, and in §65 provision is made for dividends to general creditors. Thus, §65a states that capital 'dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.' A liquidation and distribution of the debtor's property is not contemplated during the administration of a proceeding under Chapter XI. That chapter provides for the

proposal of an arrangement for the settlement, satisfaction, or extension of time of payment of unsecured debts.”

The Court of Appeals for the Third Circuit recently applied this reasoning to a reorganization under Chapter X and held that the rules of set-off contained in Section 68 of the Bankruptcy Act are not to be applied in every case, and that “. . . the reorganization court is not bound to apply, willy-nilly, the set-off rule of Section 68 of the Bankruptcy Act.”²¹ In view of the Bank’s retention of its real property security herein, upon which the loans were actually made to Salsbury, and in view of the Bank’s set-off of Salsbury’s bank deposits, it would appear to be entirely out of keeping with the spirit of the Bankruptcy Act and a great injustice to the other creditors of the debtor to allow either the doctrine of set-off or of banker’s lien to apply in the instant case as affecting the negotiable paper in the custody of the bank only for collection at the time of the filing of the petition herein.

²¹*Susquehanna Chemical Corp. v. Producers Bank & Trust Co.* (April 27, 1949), C. C. H. Bankruptcy Law Service, par. 56, 415, p. 59,668 at p. 59,671. The Court cites, as authority, in footnote 7 on p. 59,671, *Lowden v. Northwestern Nat. Bank* (1936), 298 U. S. 160; same case on remand, 74 F. 2d 847 (C. C. A. 8th, 1936), cert. den. 299 U. S. 583 (1936); *In re American Coils Co.*, 74 Fed. Supp. 723 (D. C. N. J., 1947.)

The Court also cited text authority: Finletter, *The Law of Bankruptcy Reorganization*, 303 *et seq* (1939); 11 *Remington, Bankruptcy*, §4528 (1947). 6 *Collier, Bankruptcy*, par. 9.09 (14th Ed. 1940), p. 2819.

It is certainly clear that the Supreme Court of the United States, in declaring the federal law on this subject as shown by the cases cited herein,²² does not allow any lien unless credit has actually been extended upon the face of the negotiable instruments in the hands of the alleged lienor. To allow the bank a right of lien on this paper, without any extension of credit thereon, would constitute a clear preference and thereby controvert a basic principle of the Bankruptcy Act. In an ordinary bankruptcy proceeding, the Supreme Court of the United States stated that

“ . . . nothing decided in *Erie R. Co. v. Tompkins*, *supra*, requires a court of bankruptcy, in applying the statutes of the United States governing the liquidation of bankrupts' estates, to adopt local rules of law in determining what claims are provable, or to be allowed, or how the bankrupt's estate is to be distributed among claimants. [Citing cases.] In passing upon and rejecting or allowing the proof of claim in this case, the court of bankruptcy proceeds—not without appropriate regard for the rights acquired under state law—under federal statutes which govern the proof and allowance of claims based on judgments. In determining what judgments are provable and what objections may be made to their proof, and in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy, requires its rejection or its subordination to other claims which, in other respects are of

²²*Bank of Metropolis v. New England Bank* (1843), 42 U. S. 217; *ibid.* (1848), 47 U. S. (6 How.) 212; *Biebinger v. Continental Bank* (1878), 99 U. S. 143; *Bank of Montreal v. White* (1880), 154 U. S. 660; *National Bank v. Insurance Co.* (1881), 104 U. S. 54; *Reynes v. Dumont* (1889), 130 U. S. 354; *Hanover National Bank v. Suddath* (1909), 215 U. S. 110.

the same class, the bankruptcy court is defining and applying federal, not state, law.”²³

The bankruptcy court is entitled to “ascertain the validity of liens, marshal them, and control their enforcement and liquidation.”²⁴

It is submitted that there is every reason both in policy and authority, to deny the enforcement of a lien upon commercial paper when there has been no extension of credit

²³*Heiser v. Woodruff* (1946) 327 U. S. 726 at p. 732. See also, the more recent case of *Vanston Bondholders Protective Committee v. Green* (1946), 329 U. S. 156 at pp. 162-163:

“ . . . But bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles. And we think an allowance of interest on interest under the circumstances shown by this case would not be in accord with the equitable principles governing bankruptcy distribution.” The *Vanston* case was a Chapter X proceeding.

See also *Susequehanna Chemical Corp. v. Producers Bank and Trust Co.*, *supra*, footnote 21:

“2. The interpretation and application of Chapter X are matters of federal law, just as the criteria for distribution to creditors in bankruptcy are controlled by federal law. See *Prudence Realization Corp. v. Geist*, 316 U. S. 89, 95 (1942); *Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156, 162 (1946); *Petition of Portland Electric Power Co.*, 162 F. 2d 618, 621 (C. C. A. 9, 1947). A right which would have been granted under state law may be disregarded in order to effect an equitable distribution of assets within the policy of the Bankruptcy Act. *Vanston Bondholders Protective Committee v. Green*, *supra*. The argument is a fortiori in a reorganization proceeding where the jurisdiction of the court is broader than in bankruptcy and the continuance of the business rather than liquidation is in prospect. Specifically on the subject of set-off, see Finletter, *The Law of Bankruptcy Reorganization*, 303 *et seq.* (1939); 2 Gerdes, *Corporate Reorganizations*, §759 (1936); 6 Collier, *Bankruptcy*, par. 9.09 (14th Ed. 1940); 11 Remington, *Bankruptcy*, §4528 (1947).” (C. C. H. Bankruptcy Law Serv., p. 59,668, par. 56,415, at p. 59,669.)

²⁴*Pepper v. Litton* (1939), 308 U. S. 295, at p. 306; see also *Isaacs v. Hobbs Tie and Timber Co.*, 282 U. S. 734.

upon the faith of that paper. Liens, being in the nature of implied pledges, are traditionally deemed to be based upon a detriment suffered with respect to the burdened property. The facts of this case show no such detriment and reliance. If the right of set-off may be denied in proceedings under Chapters X and XI, an even stronger case presents itself for the denial of the so-called banker's lien. The right of set-off is an ancient equitable doctrine, clearly applicable to bank deposits. On the other hand, if the Bank should be found correct in its assertion that the banker's lien is applicable to the present case, then that doctrine is exposed as a fictitious appendix, divorced from the common-sense that originated it and swollen beyond all recognition. It would be the glorification of an erroneous rule of law completely out of keeping with the rest of the Bankruptcy Act; a preference would be granted to banks upon no basis except that the lien upon securities once accorded banks to protect advances made upon the faith of such securities has now become a lien upon securities irrespective of advances.

The Courts below, in the instant case, considered themselves bound by the erroneous interpretation of the dictum in the *Gonsalves* case. Appellant submits that the California Supreme Court never purported, by that dictum, to delineate all the rules surrounding the exercise of the banker's lien. The erroneous rule asserted by the Bank of America, has no place in the administration of bankrupt estates. Banks are already in a peculiarly favored creditor position because of the right of set-off. Banks are also reluctant to lend money without express and contracted security. The addition of the alleged banker's lien to these remedies would effect an unwarranted preference and would, in this Chapter XI proceedings, defeat the purposes of the Bankruptcy Act.

CONCLUSION.

In this brief, the appellant has attempted to present an exhaustive survey of the problems involved in the instant appeal both from the standpoint of the law as it is interpreted by the courts today and the law as it stood at the time of the enactment of California Civil Code, Section 3054. Emphasis has been placed upon the law merchant for the reason, which we think should be beyond contradiction, that the enactment of Section 3054 was intended to be no more than a codification of the old rules under the commercial law. It is also significant to the consideration of this problem that banking institutions today are far removed from their counterparts in the 17th and 18th centuries in the scope of their activities. The banker for whose benefit the banker's lien was devised apparently engaged principally in safeguarding funds and money for some special purpose (often contemplating the ultimate return of such items to the customer) and in giving immediate credit on commercial bills by a simple method such as by discounting. The collection of such bills was a connected service, performed by the banker both for the benefit of himself and for his customer.

Today a banking institution covers the activities of all of us. In this respect it may be likened to the present day drug store. For all practical purposes, it buys and sells everything. Banks engage in every form of credit transaction; they deal in trust receipts, warehouse receipts, conditional sales, chattel mortgages, and a myriad of other commercial and security transactions. Banks also do considerable business as trustees and as escrow holders. More than this, banks deal with numerous correspondent banks, sometimes branches of their own institutions, and these connections are used for complicated, long range

collections with resulting credits and balances among the various banks. These commercial facts are known to everyone and we feel are judicially known by this Honorable Court.

Without any hint of disrespect to banks generally and the Bank of America in particular, it is well known that every effort is made by these institutions to insulate themselves with appropriate legislation. Thus, in the collection of commercial paper, *even where credit is extended thereon to the customer*, the bank seeks to act only as the agent for the customer and for all practical purposes without responsibility, for the activities or solvency of its correspondent banks; and further, without responsibility for the ultimate payment by the drawee of the note. Accordingly, the credit allowed on commercial paper is provisional only and conditioned upon the ultimate payment, and receipt by the bank allowing such credit, of the funds represented by the instrument. If the collecting banks fail, or the note is dishonored, the credit may be charged back to the customer. This result, so desirable from the point of view of the bank, has been accomplished by Section 16c of the California Bank Act. (Stats. 1925, p. 513, as amended; 1 Deering's General Laws, p. 212.) In the present case, however, the Bank does not cherish the pinch of agency. Rather, it desires an interest in the negotiable paper; it embraces the notes and drafts belonging to Salsbury as though they were collateral, and the Bank an implied pledgee. All this it seeks to accomplish with the so-called banker's lien. In other words, if the orders below are affirmed, the Bank may be either an agent or an alleged creditor holding security, depending upon which is more convenient to the Bank and which legal theory happens to be more helpful at that par-

ticular moment. We feel that this "inconsistency by convenience" should be eliminated by this Court in this case.

It is customary today for the average businessman to collect his commercial paper through a bank. When the bank extends credit in return for the paper, it then assumes the banking function as that function was understood at the time of the birth of the banker's lien. But where the bank merely accepts that paper as a custodial and collection agent, giving nothing in return therefor, it is acting more as an escrow holder or a depository for a special purpose than as a bank. In the performance of this latter function, the banks do not have and never had a right of lien. Under Section 16c of the Bank Act, the Bank herein would have been a mere conduit even if it had extended credit on the notes. How can it claim more in the present case?

The stand taken by the Bank of America calls to mind the language of the Court in *Bayle v. First Natl. Bank of Glen Falls* (1937) 6 N. Y. S. 2d 484, where a bank acting as a transfer agent of shares of stock, sought to retain those shares on the ground that they were deposited by a debtor of the bank. In its opinion, the Court stated (at p. 489):

"Such physical possession of them as the defendant ever secured, and the possession it now has was a legal possession only as its own transfer agent . . . the defendant was obliged to proceed as its own transfer agent and as the agent of the plaintiff to complete the matter as it had been directed to do. Then there arose a duty for the defendant to act without letting its left hand know what its right hand was doing."

For the reasons hereinabove stated, appellant respectfully urges that this Honorable Court reverse the orders of the Courts below; that the objections of the receiver to the claims of the Bank of America be sustained and that the Bank be ordered to pay forthwith to the estate the sum of \$178,950.93.

Respectfully submitted,

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By MARTIN GENDEL,

*Of Counsel for Appellant George T. Goggin, Receiver
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No. 12206

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Receiver, etc.,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS
ASSOCIATION,

Appellee.

APPELLEE'S BRIEF.

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No. 12206

IN THE

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GEORGE T. GOGGIN, Receiver, etc.,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS
ASSOCIATION,

Appellee.

APPELLEE'S BRIEF.

I.

Statement of the Case.

This is an appeal from an order of the District Court approving an order of the Referee overruling the objections of Appellant, as Receiver, to the claim of Appellee filed in the Chapter XI Bankruptcy proceedings of Salisbury Motors, Inc.

Appellee's claim showed that at the time of filing the Debtor's petition Appellee was in possession of certain notes, drafts and collection items upon which it asserted a banker's lien [Tr. 15] and that it had converted those items into money and applied the proceeds to the unpaid indebtedness of the Debtor [Tr. 15, 60, 87]. The order

allowed the claim for \$601,482.80 and directed that the net proceeds of the collection items and the sale of the real estate security should be applied in reduction of the claim.

The statement of the case appearing in Appellant's Opening Brief (App. Br. pp. 3-10) is substantially correct with two exceptions to which we will refer briefly.

First, Appellant says that the notes and drafts were deposited with the Appellee bank "for collection only." The evidence shows that these items were deposited for "collection and credit" to the depositor's account when the collections were completed [Tr. 76]. This is important because under the cases hereinafter cited it will appear that the obligation to credit the proceeds when collected is an indication that the depositor intended to create the debtor-creditor relationship.

Second, Appellant states in various places in the opening brief that Appellee bank extended no credit upon the faith of the notes and drafts in its hands for collection (App. Br. pp. 15, 22) and that it was stipulated that no such credit was extended (App. Br. p. 29). The stipulated fact is that no immediate credit was given by Appellee to the *deposit accounts* of the debtor upon the deposit of the collection items [Tr. 76]. This, of course, is entirely different from the assertion that no credit was extended, *i. e.*, no loan made to the debtor upon the faith of the notes and drafts deposited for collection. The general course of dealing hereafter discussed will indicate that under the authorities there would be a presumption that general credit was extended to the debtor upon the basis of that course of dealing.

II.

Summary of Argument.

We believe that it will facilitate an understanding of the issues in this appeal for Appellee to set forth the legal propositions and authorities which clearly demonstrate the correctness of the ruling of the District Court and the Referee, and in the course of that argument, to point out the erroneous conclusions asserted in Appellant's Opening Brief. These issues and authorities will, therefore, be discussed under the following subjects:

POINT ONE: The Court below correctly ruled that Appellee was entitled to retain the collection items and the proceeds thereof under its general bankers' lien.

1. The facts are squared within the definition of a banker's lien defined in California Civil Code, Section 3054.
2. The decisions uniformly support a general banker's lien under the facts shown.
3. Appellant's authorities are not applicable to the facts of this case.
 - (a) The application of Section 3054 of the California Civil Code must be determined by authorities subsequent and not prior to its enactment.
 - (b) Cases involving a pledge or other special agreement are not applicable to the facts of this case.
 - (c) The debtor had no power to terminate the agency for collection which was coupled with an interest.

POINT TWO: The Appellee was entitled to the proceeds of the collection items under the right of offset provided by Section 68(a) of the Bankruptcy Act.

POINT THREE: The Receiver's objections to Appellee's claim in the bankruptcy proceedings did not state facts sufficient to constitute a lawful objection to the claim.

III.
ARGUMENT.
POINT ONE.

The Court Below Correctly Ruled That Appellee Was Entitled to Retain the Collection Items and the Proceeds Thereof Under Its General Banker's Lien.

1. The Facts Are Squarely Within the Definition of a Banker's Lien Defined in California Civil Code, Section 3054.

The facts were all stipulated and for the purpose of the discussion of this point may be briefly stated as follows: At the date of filing the petition, the Debtor was indebted to Appellee in the aggregate sum of approximately \$601,000.00 [Tr. 70, 77]. On that date the Appellee held in its hands notes and drafts accompanied by order bills of lading drawn on various purchasers in various places in the United States which had been deposited with Appellee in the regular course of business for collection and credit to the commercial bank account of the debtor when the proceeds of the collection had been received [Tr. 71, 76]. No immediate credit was made to the deposit accounts of the debtor upon the deposit of the collection items, nor were they in any way pledged to secure the indebtedness of the debtor [Tr. 76].

It would be difficult to state a clearer case in which a banker's lien might apply. Section 3054 of the Civil Code of California provides:

A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business.

Every single element of the banker's lien provided for by the code section exists in this case. The collection items certainly belonged to the debtor and constituted property of the debtor. Furthermore, they were property of the debtor *in the hands of Appellee* at the time of filing the petition. It is so stipulated. The collection items had been deposited with the bank in the ordinary course of business between the debtor and Appellee. The evidence shows that during 1946, collection items so deposited averaged from \$40,000 to \$50,000 a month and during 1947 averaged about \$150,000 a month. More than \$1,300,000 in collection items had been deposited with the bank for collection and credit to the debtor's account. This clearly indicates a course of business extending for a period of almost a year and a half. There is no contention that the particular items which were in Appellee's possession at the date of filing the petition in these proceedings had been placed with the bank on any basis different from any of the other collection items which had been handled during the period.

It is conceded that on the date of filing the petition the debtor was indebted to Appellee in a sum in excess of \$600,000. All of the elements giving rise to a banker's lien as specified in the code section are, therefore, clearly present.

2. The Decisions Uniformly Support a General Banker's Lien Under the Facts Shown.

The right of a bank to a lien upon property of a debtor in its possession is not only provided by Civil Code, Section 3054, it is well recognized by the decisions of the courts of this state. The most recent decision upon this point is that of *Gonsalves v. Bank of America*, 16 Cal.

2d 169, 105 P. 2d 118 (1940), where at page 173 the Court said:

To understand this exercise of the bank's right it is necessary to state briefly its nature. Section 3054 of the Civil Code provides: "A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business." The banker's lien described in this statute is, properly speaking, a lien on the *securities* such as commercial paper deposited with the bank by the customer in the course of business. The so-called "lien" of the bank on the depositor's *account* or funds on deposit is not technically a lien, for the bank is the owner of the funds and the debtor of the depositor, and the bank cannot have a lien on its own property. The right of the bank to charge the depositor's fund with his matured indebtedness is more correctly termed a right of setoff, based upon general principles of equity. (See *Pendleton v. Hellman Commercial T. & S. Bank*, 58 Cal. App. 448 [208 Pac. 702]; 11 Cal. L. Rev. 111, 112; 7 Cal. L. Rev. 341; 38 Harv. L. Rev. 800; Brown on Personal Property, p. 518.)¹

This right of setoff, however, is not limited in its exercise to the pleading of a counterclaim in an action. Despite the technical inaccuracy involved in calling it a lien, it is in the nature of a lien or security interest in the funds, similar to and enforceable in the same way as the lien against commercial paper. That is to say, it is enforceable by the bank's own act, without the aid of a court.

¹Throughout this brief emphasis is added unless otherwise noted.

In *American Surety Co. v. Bank of Italy*, 63 Cal. App. 149, 218 Pac. 466 (1923), at page 156, the Court says:

It is settled law, and, indeed, as above indicated, it is expressly so provided by the law of this state (Civ. Code, Sec. 3054, *supra*), that a banker has a lien upon and so is *vested with the right to appropriate any money or property in his possession belonging to a customer to the extinguishment of any matured indebtedness of such customer to the bank* to the full extent of the money or property so possessed, if necessary, and so far as it may go toward such extinguishment, provided, of course, that such property or money so deposited has not been charged, with the knowledge of the bank, with the subservience of a special burden or purpose, or does not constitute a trust fund, of which the banker had notice.

The authorities go further. They hold specifically that in the absence of some agreement to the contrary a bank is entitled to a banker's lien upon *collection items* consisting of notes, checks or drafts which have been placed in its hands for collection. This rule is firmly established in the law and is uniformly stated in all of the text books. Brief quotations from them will indicate its universal application.

7 C. J. 618:

Where one who deposits paper with a bank for collection is indebted to the bank, the bank has a lien on the paper and the proceeds thereof for the amount of such indebtedness.

9 Corpus Juris Secundum 520:

Where one who deposits paper with a bank for collection is indebted to the bank, the bank has a lien on the paper and the proceeds thereof for the amount

of such indebtedness and the right to set off any matured debt against such proceeds.

8 *Zollman, Banks and Banking*, p. 429, Sec. 5661 (1936):

In the absence of an express or implied agreement to the contrary, it acquires a lien as a matter of course through the express or implied contract made with the customer for the collection of his paper for the amount of its indebtedness on such paper and its proceeds, which lien is not waived by sending the paper to a correspondent bank for whose diligence and fidelity it is agreed that it should not be responsible.

6 *Mitchie, Banks and Banking*, p. 25, Sec. 19:

It is a well-established general rule that a bank, receiving paper for collection has a lien thereon for a debt of the depositor of such paper to the bank, and is entitled to retain such paper as security for the debt, in the absence of a contract express or implied, to the contrary, and of notice of ownership in another.

7 *Am. Jur.* 453, Sec. 626:

The general rule, where commercial paper is left with a bank for collection, is that the bank has a lien thereon for the general balance of account due it from the depositor.

In *Joyce v. Auten*, 179 U. S. 591, 45 L. Ed. 332 (1900), the Supreme Court of the United States said (p. 597):

It is familiar law that a bank receiving notes for collection is entitled, in the absence of a contract, expressed or implied, to the contrary, to retain them as security for the debt of the party depositing the notes. 1 Jones, Liens, 2d ed. Sec. 244; *Bank of the*

Metropolis v. New England Bank, 1 How. 234, 239, 11 L. ed. 115, 116; *Reynes v. Dumont*, 130 U. S. 354, 391, 392, 32 L. ed. 934, 944, 9 Sup. Ct. Rep. 486.

This Court itself has had occasion to construe a statute of the State of Idaho which is in language identical to Section 3054 of the California Civil Code. In the matter of *In re Gesas*, 146 Fed. 734 (C. C. A. 9, 1906), the Court was considering the general law on banker's lien and in particular the proper construction of Section 3448, Rev. Stats. of Idaho (1887), which provided:

A banker has a general lien dependent on possession, upon all property in his hands, belonging to a customer, for the balance due to him from such customer in the course of the business.

The opinion stated the general law upon the subject and quoted from *Reynes v. Dumont*, 130 U. S. 354, 32 L. Ed. 934 (1889) (cited App. Br. pp. 33, 42), and distinguished that case in the following language (p. 736):

Those rulings are based upon the general law upon the subject or upon special statutes. It may be doubted that each of these principles is involved in the Idaho statute. It says that the lien is dependent upon possession by the banker of any of his customer's property. The debt or loan may be made without the possession or promise of possession of any of the customer's property and in no way be made upon its credit; but, when such property comes into the possession of the banker, his lien immediately attaches. An exception is when possession is given for some special purpose the property can be applied only to that purpose. *Reynes v. Dumont*, *ante*, and *Armstrong v. Chemical Nat. Bank* (C. C.) 41 Fed. 234, 6 L. R. A. 226. But I think this statute limits the matters referred to therein to those which occur

in the usual course of banking business. While it says all property of the customer, it means all such property as in the usual course of banking business banks are in the habit of dealing in, or in taking on deposit, or for collection, or otherwise, such as notes, bonds, stocks, and other choses in action, the possession of which is consistent with the usual course of banking business and which the bank can conveniently have. I doubt that it applies to the possession of stocks of merchandise or of live stock or of other cumbersome property which cannot conveniently pass into the actual possession of the bank, or such as it does not usually deal in.

It is true that the exact facts were not involved in the *Gesas* case and the Court there held that the facts did not justify the application of a banker's lien. The Court's construction of the statute which is exactly applicable to the facts of the case at bar is, however, reasonable and convincing.

A case that did involve the exact facts of the present case is the matter of *In re Farnsworth*, Federal Case No. 4673, 5 Biss. 223 (1873). In that case Farnsworth and Co. were indebted to the bank on a promissory note. In the usual course of business Farnsworth and Co. drew drafts on their customers and deposited them in the bank for collection. At the time of bankruptcy a number of these drafts were in the possession of the bank and were collected after bankruptcy. There, also, the proceeds of the drafts when collected were credited to the firm's deposit account. In that case, the Court held that the bank was entitled to the proceeds of the drafts collected after bankruptcy on two grounds: First, by reason of its banker's lien, and, second, because the transactions constituted mutual debits and credits to which the right of offset applied.

A more recent case is that of *Kane v. First Nat. Bank of El Paso, Tex.*, 56 F. 2d 534 (C. C. A. 5, 1932), where the Court said (p. 537):

We therefore face the question whether a bank having checks for collection and credit, on learning of the customer's insolvency, may collect and retain the proceeds as against a bankruptcy within four months. The question was affirmatively answered in 1873, *In re Farnsworth*, 8 Fed. Cas. page 1056, No. 4673, the right being put upon the banker's lien. There the drafts were collected after the bankruptcy. *The banker's lien extends not alone to the application of moneys and cash balances, but to the retention and collection of commercial paper and securities which have come into the banker's hands in the ordinary course of business and with no agreement to the contrary.* 7 C. J., Banks, Section 285; 3 R. C. L., Banks, Sections 213, 215; *Bank of the Metropolis v. New England Bank*, 1 How. 234, 11 L. Ed. 115; *Joyce v. Auten*, 179 U. S. at page 597, 21 S. Ct. 227, 45 L. Ed. 332. It arises as a matter of course unless rebutted. *Reynes v. Dumont*, 130 U. S. at page 391, 9 S. Ct. 486, 32 L. Ed. 934. In *Davis v. Bowsher*, 5 Term 488, it is said: "The rule is that no person can take paper securities out of the hands of his banker without paying him his general balance unless such securities were delivered to him under a particular agreement which enables him so to do." The lien of course survives the customer's insolvency. *Joyce v. Auten*, *supra*. Such a lien the appellee bank had on the checks in its hands for collection, for there is nothing in the deposit agreement which negatives it.

We respectfully submit that the rule is so firmly established in the law that there can be no doubt of its applicability to the facts of the present case.

ther, the very element that prevented the banker's lien in those cases was that the *forwarding* bank held the item for collection merely and consequently *had no title*. The facts were not within the provisions of Section 3054. Here the debtor against whom the lien is asserted *was* the owner of the items.

In *Brandao v. Barnett*, 3 C. B. 519, 136 Eng. Rep. 237 (1846), the securities were deposited in a box which was kept at the bank. The bank from time to time entered the box at the customer's request to collect interest or exchange securities. The securities were not deposited with the bank in the usual course of business transactions and the Court took the view that the arrangement precluded the exercise of a banker's lien upon them.

Counsel also argues that where paper is deposited with a bank for collection, the relationship between the parties is that of principal and agent, and title to the paper does not pass to the bank. We have no quarrel with this statement of the law. It is one of the essential elements of our case that the property upon which the lien is asserted be property of the depositor. At the time of filing the petition the collection items certainly belonged to the debtor. However, when the collection of the paper is completed, the agency terminates and the bank becomes the owner of the money and the debtor-creditor relationship arises. *Jennings v. United States Fidelity & G. Co.*, 294 U. S. 216, 55 Sup. Ct. 394, 79 L. Ed. 869, 872, 99 A. L. R. 1248 (1934); *Kane v. First Nat. Bank of El Paso, Tex.*, 56 F. 2d 534 (C. C. A. 5, 1932). But there is nothing in Section 3054 which precludes the application of a banker's lien upon property which belongs to the depositor. On the contrary, the lien can only apply upon property which

does belong to the depositor. Obviously, the bank could not have a lien upon its own property.

It is clear, of course, that in order for a banker's lien to exist there must be a matured indebtedness from the customer to the bank. If there were no indebtedness there would be no reason for a lien. The argument that credit must be extended upon the particular items upon which the lien is asserted is not supported in reason or by the authorities. Appellant quotes from numerous sources to the effect that a banker's lien ordinarily attaches in favor of the bank upon securities of a customer deposited in the usual course of business "for advances *supposed to have been made* upon their credit." The very words quoted so often "supposed to have been made" indicate not that advances must be made but rather that there is a presumption that "advances have been made upon the credit of the securities in the bank's possession." An insight into a possible reason for this presumption may be found in American Jurisprudence, 7 Am. Jur. 452, in which the author states:

The reason given for allowing the lien is that any credit which a bank gives by discounting notes or allowing an overdraft to be made is given on the faith that money or securities sufficient to pay the debt will come into the possession of the bank in the due course of future transactions.

Whatever may have been the historical reason for the banker's lien, it is a part of the substantive law, recognized by statute and court decisions and applicable to the facts of this case without the limitation that Appellant has sought to attach to it.

(b) CASES INVOLVING A PLEDGE OR OTHER SPECIAL AGREEMENT ARE NOT APPLICABLE TO THE FACTS OF THIS CASE.

We do not question the rule that where property is *pledged to secure a specific debt* it cannot be held under a banker's lien as security for some other debt. The reason for this is that when the property is pledged for a specific debt, there is an agreement implied from the circumstances or the nature of the transaction that it shall not be held for any other debt. The rule is stated and discussed in an annotation in 68 A. L. R. 912 as follows:

But, if collateral is pledged for the security of a particular, specified debt, the pledgee has no lien on the collateral pledged for any other or subsequent debt contracted by the pledgor to him, without an agreement to that effect, either express, or implied from the nature or circumstances of the transaction.

In this annotation the authors in support of the rule cite *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889 (1908), and *Berry v. Bank of Bakersfield*, 177 Cal. 206, 170 Pac. 415 (1918), as authorities for the rule in the State of California. These are the very cases cited by counsel for the Appellant in support of his contention that the right of a banker's lien has been limited in some circumstances. These cases have no bearing upon the facts involved here. In the instant case, the collection items were not pledged to secure any indebtedness, nor were they in the possession of the bank as an escrow holder or trustee [Tr. 76]. *They had been deposited with the bank in the usual course of business for collection and credit to the debtor's commercial deposit account.* Cases such as *Anglo-Cal. B. v. Grangers' B.*, 63 Cal. 359 (1883), or

Berry v. Bank of Bakersfield, supra, or *Della v. The Home Bank of Porterville*, 105 Cal. App. 106, 286 Pac. 1064 (1930), therefore have no application to the facts involved in the present proceeding.

An analogous situation is found in the decision of this Court in the case of *Wells Fargo Bank & Union Trust Co. v. McDuffie*, 71 F. 2d 720 (C. C. A. 9, 1934). The facts in that case may be briefly stated as follows: The Wells Fargo Bank had a credit arrangement with Richfield Oil Company for the purchase of acceptances consisting of foreign bills of exchange accompanied by shipping documents. The acceptance agreement provided that the bank should have a lien on the drafts not only for the liability under the acceptance agreement, but for all indebtedness of the Richfield Oil Company to the bank. In addition to the drafts taken under the acceptance agreement there were two foreign drafts deposited with the bank for collection *which were not pledged* in any way but which *were* in the bank's possession at the time of the receivership. The question at issue was whether or not the bank had a general banker's lien on these foreign drafts which were in its possession and not covered by the acceptance agreement. Upon this point the Court said at page 727:

The situation with reference to the bills of exchange for \$23,532.08, drawn on Birla Bros., and the one for \$1,245.11 drawn on Valezquez, is somewhat different. They were not held in a special sense "as security for acceptances." *No credit had been extended on account of them, but the bank had a lien thereon for all sums due it which would include, of course, sums due it upon unpaid acceptances.*

One of the cases cited in the argument of counsel for the Receiver is *Powell v. Bank of America*, 53 Cal. App. 2d 458, 128 P. 2d 123 (1942). In view of the difference in facts in that case from the present one it is actually authority for Appellee's position. In stating the circumstances in which a banker's lien could *not* apply the Court indicated that in circumstances such as here the right to a general banker's lien does exist. In the *Powell* case a person not a customer of the bank delivered certain warehouse receipts to the bank under written instructions to deliver them to certain grain dealers upon collection of the sum of \$2,186.89. The instructions provided that from that amount they should remit \$240.09 to the person forwarding the item and the balance "to be remitted direct to L. M. Miller, Knights Landing, California." The bank attempted to hold the funds that were to be remitted to Miller under a claimed banker's lien in order to apply them upon an outlawed judgment that the bank held against Miller. The Court pointed out in its opinion that Miller, the owner of the money, *was neither a customer nor a depositor of the bank* and there was no possible basis upon which it could be said that the bank was authorized to deposit the money in the bank to the credit of L. M. Miller or to create a relationship of debtor and creditor between them.

In the present case we have the exact opposite situation. The debtor in these proceedings was a borrowing customer and a depositor of the bank, and it specifically directed that the proceeds of the collections should be credited to the debtor's commercial deposit account.

(c) THE DEBTOR HAD NO POWER TO TERMINATE THE AGENCY FOR COLLECTION WHICH WAS COUPLED WITH AN INTEREST.

The stipulated facts show that after the filing of the petition the debtor attempted to terminate the agency of the bank to collect a promissory note signed by the Jacques Power Saw Company of Denison, Texas, and to collect the proceeds of that note direct from the maker. Clearly, the debtor had no right to possession of the collection item. The statute provides that the bank shall have a lien upon all property in its hands to secure the indebtedness owing to the bank. There could be no effective lien if the bank's customer could at will demand return of his property without payment of the indebtedness. Such a construction would negative the statute itself. In *First Nat. Bank of Corona v. Coplen*, 39 Cal. App. 619, 179 Pac. 708 (1919), the Court said (p. 620):

That "a banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business," is declared by section 3054 of the Civil Code; and that a bank may, in the exercise of the right to enforce such lien, appropriate the money in its possession belonging to a customer in the extinguishment of the customer's matured indebtedness, is declared in the case of *Melander v. Western Nat. Bank*, 21 Cal. App. 462 [132 Pac. 265], and cases cited therein. To hold the right to so apply the deposit is *dependent upon the consent of the depositor would destroy* the right given.

Obviously the debtor could not by its mere assertion of the right to receive the collection deprive the bank of its banker's lien upon the notes held in the hands of the bank at the time the petition was filed.

The same rule is stated in *Kane v. First National Bank of El Paso, Tex.*, *supra*. The Court said (p. 538):

Without any new act or transaction between the depositor and the bank, but the natural and legal fruition of the contracts of deposit from which neither party could have withdrawn without the consent of the other, collection was made and *ipso facto* the amount went to the credit of the depositor, and the bank became a debtor by general deposit. The result takes its character as preferential or not from the intention with which the contracts were made that produced it. The lien is of importance *only to show that the collection could not have been withdrawn by the depositor in the meanwhile*. Thereafter the bank was within its rights in closing the account and refusing to permit further checking on it.

The letter attempting to terminate the agency for the collection of the Jacques Power Saw Company note was clearly ineffective for any purpose. For the same reason, the Receiver's demand could not be effective to destroy Appellee's lien.

POINT TWO.

The Appellee Was Entitled to the Proceeds of the Collection Items Under the Right of Offset Provided by Section 68(a) of the Bankruptcy Act.

We believe that the authorities which have heretofore been cited, conclusively show the correctness of the judgment of the Court below that Appellee was entitled to hold the collection items and the proceeds thereof under its general banker's lien. Notwithstanding those decisions, however, there is another basis upon which the bank is entitled to retain the proceeds of the collections which is equally supported by the law and the decisions and that is the right of setoff provided by Section 68(a) of the Bankruptcy Act. (11 U. S. C. 108(a).)

We have no quarrel with the principle that the right of setoff cannot exist where the money is held by a bank in the capacity of a trustee or escrowholder nor obviously could it be asserted in a case in which the bank or person seeking to establish the setoff had received or was attempting to establish a preference within the meaning of the provisions of the Bankruptcy Act. This is the extent of the holdings in the cases cited by counsel for Appellant, such as, *Continental Nat. Bank v. Moore*, 299 Fed. 270, 272 (C. C. A. 9, 1924); *Union Bank & Trust Co. v. Loble*, 20 F. 2d 124 (C. C. A. 9, 1927), and other cases.

It is clear that in the instant case the collection items were not held by the bank as a trustee or escrowholder. Neither is there any allegation in the pleadings that the Appellee secured any manner of a preference either by

offsetting the deposit accounts or by its retention of the collection items.

It is likewise conceded that the right of setoff cannot apply unless there are mutual debts and credits and that the relation ordinarily existing between a bank and its customer when the bank has received items for collection is that of principal and agent. As we have pointed out previously, however, the relation of principal and agent exists until collection of the items is effected and at that time the relation of debtor and creditor arises (*Jennings v. U. S. Fidelity & G. Co.*, 294 U. S. 349, 79 L. Ed. 869, 872, 99 A. L. R. 1248 (1934); *Kane v. First Nat. Bank of El Paso, Tex.*, 56 F. 2d 534 (C. C. A. 5, 1932)).

Section 68(a) of the Bankruptcy Act (11 U. S. C. 108(a)) provides as follows:

Section 68. *Setoffs and Counterclaims.* (a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

There would be no possible question of the setoff in this case were it not for the fact that the proceeds of the collection items were not in fact received by Appellee until after the commencement of these proceedings. Under the authorities, however, it is well settled that notwithstanding the fact that the proceeds were collected after bankruptcy, the rule of setoff provided by Section 68(a) applies.

The law as stated by the cases hereafter referred to is that when property has been deposited by a bankrupt with a creditor under such circumstances of dealings between the parties that *a conversion into money* is in the ordinary course of business the natural result of the transaction, the *obligation of the creditor* to convert the property into money and give credit thereon is a mutual credit in the bankrupt's favor which under 68(a) of the Bankruptcy Act is required to be offset against the indebtedness of the bankrupt to the creditor.

The evidence in this case shows that upon each of the collection items that were received by Appellee and were in the hands of Appellee on the date of filing the petition, the debtor had issued and Appellee had accepted instructions to credit the proceeds of said collections when received to the commercial account of the debtor [Tr. 76]. It was, therefore, an *express agreement* as to each item which imposed an obligation upon Appellee, first, to collect the item and, second, to create the relation of debtor and creditor by deposit of the funds to the general account of the debtor when collected.

The exercise of the right of offset as to the balances in the deposit accounts prior to the filing of the petition did not and could not from the nature of the transaction affect the contract of the bank to collect the notes and drafts in its possession and to credit the amounts thereof to the debtor's account even though they might be subject to immediate offset.

This obligation to collect and credit the account gives rise to the right of offset against an indebtedness of the debtor to Appellee under Section 68(a) of the Bankruptcy Act. This very point was decided by this Court in *Half Moon Fruit & Produce Co. v. Floyd*, 60 F. 2d 799 (C. C. A. 9, 1932). In that case the bankrupt before bankruptcy had consigned 75 carloads of melons to the Half Moon Fruit & Produce Co. and was indebted to that company upon an open account in substantial sums. Thereafter the melons were sold and the proceeds applied upon the indebtedness of the bankrupt. Part of the melons were sold after the creditor had actual knowledge of the bankrupt's insolvency. The consignee filed its claim against the bankrupt's estate upon which it gave credit upon the existing indebtedness for the proceeds of the sale of the 75 cars of melons. In that case the trustee objected to the allowance of the claim unless and until the claimant should relinquish \$10,000 which it had received from the sale of the 75 carloads of melons belonging to the bankrupt which the trustee contended constituted a preferential payment. Although no claim of a preference is made in the present proceedings, in other respects the facts are practically identical with the *Half Moon Produce* case. This Court held the transaction did not amount to a preference and also held that the right of offset existed. The Court said (p. 802):

At the time of the consignment of melons by the bankrupt to the appellant, the appellant owed the bankrupt the duty of converting the melons into money for the account of the bankrupt, and it is this

obligation of the consignee which the cases above cited held to be a credit in his favor to be offset against the credit of the consignee for moneys previously advanced, thus, to the extent thereof, canceling the mutual obligation or mutual credit.

As to the second proposition that the preferential payment cannot be set off against the debt upon which proposition the appellee cites *Walker v. Wilkinson* (C. C. A.) 296 F. 850, it is sufficient to point out that this assumption begs the question as to whether or not the payment is preferential. If the transaction were fixed by the dates of the consignment of the melons, there was no voidable preference under the law. This is what is contended for by the appellant and is well settled by the authorities. *The conversion of the goods into money is a mere incident in the transaction.*

In *Kane v. First National Bank of El Paso, supra*, the situation was likewise similar to the facts of the case at bar. In that case the bankrupt before bankruptcy had deposited certain checks to its deposit account with the bank for collection and credit to its deposit account. At the time the checks were left with the bank, the bank did not know that the depositor was insolvent, but it subsequently learned that before the checks were collected. Although upon the deposit, credit was given to the bankrupt's deposit account, it was specifically understood that the depositor had no right to draw against the funds represented thereby until the proceeds were collected. To that extent the case is no different from the case at bar

in which the collection items were deposited with a request that credit be given when the items were collected. There again the Court held, as we have indicated in a quotation from the opinion in an earlier part of this brief (*ante* p. 11), that the banker's lien attached not only to the collection item but to the proceeds of the collection and that when collected the amount of the collection *ipso facto* went to the credit of the depositor and thereupon the offset arose.

The application of the setoff to a situation of this kind is closely analogous to that which arises upon a secured claim. There the statute specifically requires that the securities shall be *converted into money* and the amount credited upon the creditor's claim.²

There, as here, the actual *amount* to be offset cannot be determined until after bankruptcy but it is required to be determined pursuant to the contract. Here the amount was determined by collection of the items pursuant to the contract of the parties. When collected, the amounts so collected necessarily were and should be applied in reduction of Appellee's claim against the estate of the debtor. We respectfully submit that the contract obligation to convert the collection items into money gives rise to the offset under the statute.

²Section 57(h) of the Bankruptcy Act (11 U. S. C. 93(h)) provides:

The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee by agreement, arbitration, compromise or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance. Such determination shall be under the supervision and control of the court.

POINT THREE.

The Receiver's Objections to Appellee's Claim in the Bankruptcy Proceedings Did Not State Facts Sufficient to Constitute a Lawful Objection to the Claim.

In the proceedings before the Referee, the Receiver caused an Order to Show Cause to be issued against Appellee to secure possession of the proceeds of the promissory note for \$34,673.50, signed by the Jacques Power Saw Company [Tr. 37-38]. Appellee objected to the jurisdiction of the Referee by summary process to recover this note or the proceeds thereof [Tr. 40-41]. These objections were overruled by the Referee [Tr. 67] and the proceeding was consolidated with the objections of the Receiver to Appellee's claim. In its answer to the Receiver's objections Appellee likewise objected to the jurisdiction of the Referee [Tr. 58].

The Receiver's purported objections to the claim do not in fact state any legally sufficient objections. It is admitted that there was an indebtedness owing by the debtor to the Appellee in the sum of approximately \$601,000.

It is admitted that Appellee was in possession of the collection items upon which it had asserted a banker's lien. The validity and amount of the indebtedness was not disputed nor was any question raised as to the sufficiency of the proof of the claim. Neither was there an allegation of any facts seeking to establish that Appellee had received a preference thus bringing the case within the provisions of Section 57(g) of the Bankruptcy Act. It is clear, therefore, that the Receiver's pleading was no more than an attempt to vest jurisdiction in the bankruptcy court of an action to recover possession of the property of the bankrupt which was lawfully in Appellee's

possession at the time of filing the petition. The authorities are legion that in the absence of consent the bankruptcy court has no jurisdiction by summary process to determine the title or right to possession of property which is in the possession of third persons at the time the bankruptcy petition is filed. Even where a preference has been obtained and we emphasize the fact that no preference has been claimed in this estate, the provisions of Section 57(g) of the Bankruptcy Act merely provide that a claim shall not be allowed unless the preference is surrendered. It does not give the bankruptcy court summary jurisdiction to recover the alleged preference and such a proceeding must be by plenary action.³

In Point Three of Appellant's Opening Brief (App. Br. p. 40) it is suggested that this being a Chapter XI proceeding, the ordinary right of a banker's lien or right of setoff does not necessarily apply. The only cases cited in support of this proposition are decisions rendered in Chapter X proceedings where the right of secured as well as unsecured creditors are affected and the statute even authorizes the creation of liens prior to existing liens. Chapter XI proceedings, on the other hand, relate only to an arrangement with unsecured creditors and there is nothing in the statute to give the Court jurisdiction over secured creditors nor to defer their security interests to other creditors.

Furthermore, this point was not raised in any of the pleadings in the Court below and we respectfully submit

³2 Collier, Bankruptcy (14th ed.), Par. 23.06, pp. 480, 481, 500.

that it is not of the character that may be raised for the first time on appeal. If the Court should be of the opinion that the matter deserves consideration we respectfully urge that Appellee be afforded an opportunity to enlarge the Record on Appeal to show that the plan of arrangement approved by creditors and confirmed by the Court below provided for a sale of all assets of the Debtor as a going concern, and that such sale has been consummated. The matter is therefore moot.

Conclusion.

The facts are simple and are all stipulated. At the filing of the petition Appellee held the collection items under a general banker's lien as security for an admitted indebtedness of over \$600,000. Under the law and the decisions it was entitled to appropriate the items and the proceeds thereof to apply upon the indebtedness. This is in conformity with Section 57(h) of the Bankruptcy Act, and an application of the right of setoff required by Section 68(a) of that Act.

The Appellant has shown no facts nor cited any authorities giving him the right to recover the Appellee's security. The cases upon which he relies may be correct statements of the law applicable to the facts of those cases but they have no application to the facts of this case. Here the stipulated facts show that the collection items were in the bank's possession in the ordinary course of business extending over a long period of time, they were not pledged for any specific obligation nor held in escrow or trust for any special purpose. They were deposited

for collection and credit to the commercial deposit account of the debtor in the normal course of business. Under these facts it is respectfully submitted that the cases herein cited show that the right of the banker's lien applies and that Appellee's claim was filed and the security converted to money in conformity with the requirements of the Bankruptcy Act.

It is respectfully submitted that the decision of the District Court should be affirmed.

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No. 12206.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Receiver of the Estate of Salsbury
Motors, Inc., Debtor,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSO-
CIATION,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

Comes Now the appellant, George T. Goggin, as Receiver of Salsbury Motors, Inc., Debtor, and submits the following reply brief:

I.

The Bank's Position Is Inconsistent, the Proposition That There Is No Need to Study the Statutory History and Older Cases Which Shaped Section 3054 of the California Civil Code Is Untenable.

The Bank's brief is afflicted with a major inconsistency. On the one hand, the Bank argues that the facts of the instant case are squarely within the definition of a banker's lien as defined by California Civil Code, Section

3054, and, on the other hand, it argues that cases involving a pledge or other special agreement are not applicable to the facts of this case. (Appellee's Br. pp. 4, 16.) The appellant can have no quarrel with the Bank over the words contained in California Civil Code Section 3054, Nevertheless, if those words are to be deemed conclusive (without reference to a multitude of cases on the subject), then they must also be equally conclusive in the several situations pointed out in Appellant's Opening Brief which are merely brushed aside by the Bank as exceptions.

For example, the Bank attempts to dispose of *Brandao v. Barnett* (Appellee's Br. p. 14), with the statement that the securities were not deposited with the Bank in the usual course of business transactions. It is clear from the case that the securities were deposited with the Bank for safekeeping and that the Bank was even authorized to handle the securities for certain specified purposes. Surely, the safekeeping function of banks is as ancient and widespread as their collecting function. If we were to superimpose the bare language of California Civil Code Section 3054 upon the factual situation in the *Brandao* case, it could well be argued afresh that the Bank would be entitled to a lien upon items in safe deposit boxes.

The Bank contends that the lien should exist in the instant case because "every single element of the banker's lien provided for by the code section exists" herein (Appellee's Br. p. 5), but is unable to explain the case of *Berry v. Bank of Bakersfield*, *Della v. The Home Bank of Porterville*, or *Anglo Cal. Bank v. Grangers' Bank* (Ap-

pellee's Br, pp. 16, 17) where the same elements existed, save to state that these are exceptions.¹

It can hardly be argued that such exceptions are contained in the words of the statute itself.

The reason the Bank is caught in this self-contradictory position may be explained, perhaps, by its equally untenable statement that the application of Section 3054 of the Civil Code must not be determined by authorities prior to its enactment. (Appellee's Br. p. 12.) It is, of course, not the understanding of appellant that only pre-1872 cases are admissible in the discussion of this question. Indeed, Appellant's Opening Brief presents cases dating before 1872 only in a few instances. But these early cases are of extreme importance because they are cited by the Code Commissioners in their notes to the Code. The banker's lien statute did not spring full blown from the minds either of the California Code Commissioners or of the legislators in 1872. Section 3054 was merely a restatement of the law merchant and the Code Commissioners presented it to the legislature as such; it was presumably enacted into law on that basis. (App.

¹See also cases cited App. Op. Br. p. 39, fn. 20.

Further, the Bank is in error when it contends that the basis for the corresponding bank cases is that "the *forwarding* bank held the item for collection merely and consequently *had no title*." (Appellee's Br. p. 14.) The Supreme Court of the United States, in *Bank of Metropolis v. New England Bank* (1843), 1 How. (42 U. S. 234), expressly refused so to hold. The Court stated at length (1 How. at p. 239) that so long as the forwarding bank treated the negotiable paper as its own, the corresponding bank was under no obligation to inquire whether the forwarding bank was the agent or the owner; and the Court went on to state that the crucial question was not that of title but rather whether there had been an advance of money upon this paper.

No attempt was made in Appellee's Brief to meet the numerous cases cited by Appellant not involving corresponding bank cases.

Op. Br. p. 24.) Until now, appellant was of the settled belief that it was no longer necessary to argue the value and propriety of statutory history.

The Commissioners' Notes and the early cases forcefully demonstrate that the foregoing cases are not mere "exceptions" or merely "inapplicable." Rather, they were factual situations that never fell within the intended meaning, definition and extent of the banker's lien. All of those cases deal with usual and ordinary banking functions. All of them are within the words of the statute. But the banker's lien was never intended to, nor does it, apply where the bank holds merely as an agent or has never extended credit on the faith of the property in its custody. Unless viewed in this light and unless taken historically and analytically, these cases are irreconcilable with the language of California Civil Code Section 3054.

II.

The Bank's Own Authorities Require an Extension of Credit as a Condition to the Application of the Banker's Lien.

The Bank also contends that the overwhelming weight of authority supports its position that the banker's lien applies under the facts of the present case. The Bank's cases, on their face, do not so hold and its textual and encyclopedic references are too general to be of material aid. It is appellant's position that the general and meaningless reiterations, without analysis, displayed in Appellee's Brief are inadequate in the light of the cases and reasoning supporting appellant. Most of the cases cited by the Bank have been carefully analyzed in Appellant's Opening Brief and they are actually in support of appellant rather than in support of the Bank.

In fact, the quotation from American Jurisprudence lends support to appellant's position. The Bank submits one quotation on page 9 of its brief which is wholly undone by the quotation on page 15. But even the quotation on page 15 is inadequate. Appellant therefore takes the liberty of repeating in full the statement from American Jurisprudence contained on page 15 of appellee's brief and, in addition language, immediately following:

“The reason given for allowing the lien is that any credit which a bank gives by discounting notes or allowing an overdraft to be made is given on the faith that money or securities sufficient to pay the debt will come into the possession of the bank in the due course of future transactions. [End of quotation in Appellee's Br., p. 15.] Such a lien, however, is not recognized in any case where there exist circumstances or a course of dealing inconsistent with its existence, and it would seem that the lien should be confined to securities and valuables which may be in the banker's custody as collaterals. The credit must be given on the credit of securities or valuables either in possession or expectancy. This is properly the extent of the banker's lien”

The Bank has also placed stress upon the case of *In re Gesas* (C. C. A. 9, 1906), 146 Fed. 734, which contained an interpretation of an Idaho statute identical to Section 3054 of the California Civil Code. The Bank neglected to quote from a portion of the case immediately preceding the language set forth on page 9 of its brief. The language is as follows:

“This [Idaho] statute seems chiefly to be but a statement in statutory form of the law upon this subject, as generally recognized: That bankers have

liens upon any security or property coming into their possession in the usual course of banking business, for the payment of any indebtedness due them from the owner or depositor of such securities. This rule is subject to modifications, which may be illustrated by quotations from *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934. Quoting from other authorities, it is said (page 390 of 130 U. S., page 495 of 9 Sup. Ct. [32 L. Ed. 934]): ‘A general lien does arise in favor of a bank or banker out of contract, expressed or implied, from the usage of the business, in the absence of anything to show a contrary intention. It does not arise upon securities accidentally in the possession of the bank, or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien . . . *‘A banker’s lien . . . ordinarily attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit . . . Here, then, . . . is the true principle upon which this, as well as all other banker’s liens, must be sustained, if at all. There must be a credit given upon the credit of the securities, either in possession or in expectancy.’*”

“From the foregoing, two principles may be deduced: The securities upon which liens may be maintained must be deposited in the regular course of the banking business, in which also is implied, I think, that they must be of the character or class usually dealt in or deposited in banks in the course of their usual banking business, *and the debt must have been incurred upon the faith of such securities actually delivered or promised.*” (Italics added.)

(At this point, begins the quotation found on page 9 of Appellee's Brief.)

The *Gesas* case itself dealt with a situation in which property was placed in the possession of the bank for the very purpose of securing a debt to that bank. The court never resolved the question it raised as to whether the rule stated in *Reynes v. Dumont* applied to the Idaho statute, but concluded that stock in trade given to a bank for the purpose of securing a debt did not fall within the "usual course of the business" and that therefore the banker's lien would not apply in any event. In California, we have no problem as to whether the common law (more accurately, law merchant) rules, stated in *Reynes v. Dumont* and elsewhere, are applicable to the statutory definition of the banker's lien, since the California cases and the Commissioners' Notes have settled this question, if it ever actually existed, in emphatic language. (App. Op. Br. p. 24, and fn. thereon.)

III.

The Bank Cannot Establish a Power Coupled With an Interest in This Case. The Agency for Collection Was Terminable at the Will of the Principal.

In addition to its inconsistent arguments upon the "plain-wording" of the statute as against the well-settled exceptions not contained in that wording, and its refusal to face the legislative and statutory and case law history of California Civil Code Section 3054, the Bank has further seriously erred in contending that the agency for collection in the instant case was "coupled with interest." (Appellee's Br. pp. 19-20.) The Bank has been presented with well-settled authority to the effect that when notes are placed in the custody of a bank for collection, and the

bank does not advance credit on the notes, the bank takes the notes only as an agent with the owner of those notes as its principal. (App. Op. Br. p. 17.) The cases are in such unanimity of agreement to this effect, that we do not understand that the Bank would undertake to deny them. Certainly, no such attempt was made in the section of its brief on this subject.² (Appellee's Br. pp. 19-20.)

The Bank has, however, sought to interject into this well-settled proposition the concept of an agency coupled with an interest. An agency coupled with an interest constitutes an irrevocable power. The Bank could assert an irrevocable power or agency only if the notes were taken as security or if elements of an estoppel were present. But the Bank has cited no case to show that a collecting agent is entitled to retain the notes and drafts of its principal in violation of the terms of the agency merely because on another occasion the agent lent money to the principal under terms of repayment that made no mention of the lender's collecting function. In the instant case,

²The Bank cited two cases but they are inapplicable:

The case of *First Nat. Bank of Corona v. Coplen* (1919), 39 Cal. App. 619, is no authority for the Bank's position. (Appellee's Br., p. 19.) That case refers to the banker's lien in language but is actually concerned with the right of set-off. The Bank merely sought to set-off a deposit against a debt of the depositor owing to the bank. The Bank also cites the *Kane* case as authority for this remarkable proposition of law, but it is notable that in the *Kane* case, credit was extended by the bank on the deposit of the checks; the checks were actually deposited in the account of the customer, and said checks were actually collected by the bank and the receipts of said collections seized by the bank *before the commencement* of the bankruptcy proceedings. There is nothing in either of these cases holding that a note in the custody of a bank for collection only, and upon which no credit was extended, cannot be withdrawn by the customer at will.

For a full discussion of the *Kane* case, see footnote 4, page 34, Appellant's Opening Brief.

the debtor made no agreement, and had no obligation, to employ the Appellee-Bank to collect the notes or drafts involved. The debtor could at any time have assumed direct collection, employed another agency or even another bank. If the Bank's theory is to hold water, then every businessman, after borrowing from his bank, should use a different bank to collect his notes and drafts. This requirement would be ridiculous and, therefore, highlights the error of the lower court.

The doctrine of agency coupled with an interest was presumably put forward by the Bank in order to counter the authorities presented by the appellant to the effect that the date of the filing of the petition for arrangement was the date of cleavage. At that time the rights and the duties of the parties were frozen and the relationship of the parties must be considered as of that date. (App. Op. Br. pp. 17 and 18, footnote 4.) We must assume, therefore, that the Bank is arguing that a principal is never entitled to revoke his agent's authority to collect notes or drafts until the agent has been paid any other debts owing to it by its principal. This argument is made by the Bank despite the fact that in the instant case, the principal borrowed money from the agent in an entirely separate transaction pursuant to a well-defined agreement, which agreement provided for certain security and made no provision for the notes and drafts presented to the Bank for collection to constitute additional collateral.

It is established law that the authority of the agent may be revoked at the will of the principal, although it is possible that some liability might arise for such collection expenses as might have been incurred up to that time by the Bank. The very problem of the revocability

of the authority to act as a collecting agent was passed upon by the New York Court of Appeals in *Potter v. Merchants' Bank* (1864), 28 N. Y. 641. That case is of particular pertinence to this proceeding because it dealt not only with the power of the principal to revoke the authority of the agent, but involved a question of banker's lien, as well. In the *Potter* case, the plaintiff was the receiver of an insolvent bank. The cashier of the bank, before insolvency, sent an item to the defendant bank for collection. Usually, according to the evidence, such items were credited on the account of the insolvent bank on the defendant's books, but that was not done in this case. Subsequent to the insolvency, but before the collection of the due date of the note, the plaintiff receiver demanded the return of the note. The defendant bank refused, claiming that it held the note under its right of lien for its balance of account. The New York Court of Appeals held that the defendant bank had custody of the note only as agent for collection. The title, therefore, was in the plaintiff. The opinion of the court contains the following statement (28 N. Y. at page 652):

“The defendant, after it acquired possession of the note, held it as the agent of the Bank of Medina for the purposes of collection, and as the demand was made before maturity of the note, there is no ground for claiming that a title to it passed to the defendant. The demand terminated the agency, and the refusal was evidence of a conversion.”³

³For a case so holding where the revocation of authority was by an individual and not by a bank, see *First Nat. Bank v. Morrell and Co.* (1928), 53 S. D. 496, 221 N. W. 95.

There is no contention by the Bank in the instant case that any title to the notes and drafts ever passed to it. The title to the notes and drafts concededly remained in the debtor and, consequently, in the appellant. Accordingly, the agency was revocable at any time in accordance with the ruling in the *Potter* case and with the rules of agency generally.⁴

It is important to note that in the *Potter* case the defendant bank contended that it retained the note under its right of banker's lien for the balance of account due it. The Court specifically held that the doctrine of banker's lien had no application because the agency of the bank was terminated before collection.

Accordingly, at the time of the filing of the petition for arrangement herein, the parties occupied a principal-agent relationship and the rights and liabilities were frozen as of that date. The ownership of the notes passed to the receiver who was entitled to, and did, revoke the authority of the Bank to collect the notes and drafts.

⁴*McGorray v. Stockton Sav., etc., Soc.* (1901), 131 Cal. 321. In this case, the plaintiff had deposited a sum of money with the defendant bank to be paid to the sheriff upon the latter's delivery of a certain certificate to the defendant bank. Subsequently the plaintiff revoked the agency but the bank refused to return the money to plaintiff. In reversing a judgment for defendant, the Supreme Court of California stated (131 Cal. at p. 325):

" . . . the bank became the agent of plaintiff to do a particular act (Civ. Code, secs. 2295, 2297); and the principal (plaintiff) could terminate the agency at any time before the act was performed and before any rights of third persons had intervened; the agency was terminated by its revocation. (Civ. Code, sec. 2356.)

IV.

The Doctrine of Set-off Is Inapplicable to the Facts of This Case.

It is not the purpose of appellant to embark here on a further discussion of the applicability of the rules of set-off to the facts of the instant case. The arguments and cases cited on pages 15 through 18 and in footnote 5 extending from page 18 to page 20 of Appellant's Opening Brief are sufficient to demonstrate that the doctrine of set-off is inapplicable here.

Appellant wishes to take specific exception, however, to the statement by the Bank (Appellee's Br., p. 24) that the facts in the instant case are "practically identical" with those in the *Half Moon Produce* case. The produce company, in that case, extended credit upon the melons and the melons were sold before the petition in bankruptcy of the grower had been filed. (Appellant's Op. Br., footnote 5, pp. 19-20.) The facts in the *Half Moon* case are therefore widely at variance with those of the instant case.^{4a}

^{4a}The Bank compares the instant case to one arising under Section 57(h) of the Bankruptcy Act where it is required that secured creditors shall convert into money the securities held by them, pursuant to the agreement by which such securities were delivered to the creditors. The notes and drafts in the instant case were not delivered to the Bank as security under any agreement. A loan had been made earlier, and the Bank took a trust deed as security for that loan. Nothing was stated in the loan agreement between the debtor and the Bank concerning collection items. Therefore, there can be no analogy between the applicability of the doctrine of set-off to the instant facts and cases arising under Section 57(h) of the Bankruptcy Act.

V.

The Bankruptcy Court Had Summary Jurisdiction.

The Bank has raised the point of absence of summary jurisdiction by the Referee in the instant case (Appellee's Br., pp. 27-28), but has cited no case authority to sustain its position, merely contending that it did not consent to the jurisdiction of the bankruptcy court.

The record shows that the Bank voluntarily filed a proof of claim in the within bankruptcy proceedings. [Tr. 13.] It therefore sought to share in the bankrupt estate and consequently the Receiver was entitled to object to said claim and to seek affirmative relief.⁵

⁵*In re Mercury Engineering Co.* (1945), D. C. S. D. Cal. (60 Fed. Supp. 786, at pages 787-788):

"My own impression is, despite some older decisions by other judges of this district, that in the light of the more modern trend to identify the function of the Referee in passing on claims with that of a court of equity (see *Pepper v. Litton*, 308 U. S. 295, 308, 60 S. Ct. 238, 84 L. Ed. 281), the right to award a judgment for the surplus exists. The right to enter judgments is specifically conferred by Subdivision 15 of Section 2, sub. a, of the Bankruptcy Act of 1938, 11 U. S. C. A. §11, sub. a(15). The power to allow and disallow claims is conferred by Subdivision a of Section 2, 11 U. S. C. A. §11, sub. a. Section 68, subs. a and b of the Act, 11 U. S. C. A. §108, subs. a and b, grants the power of determining set-offs and counterclaims. Courts which have interpreted these new enactments are of the view that they aim to make the Referee 'an officer authorized to perform judicial duties.' *Donald v. Bankers Life Co.*, 1939, 5 Cir., 107 F. 2d 810, 812. Counterclaims, set-offs and cross bills are creatures of equity carried over into modern pleading. One who comes into a court of equity and asks that it give recognition to a claim, so that he may share in an estate before it in the proportion which his claim bears to the value of the estate, has brought before the court the determination of his entire claim. And if the court finds that his claim is invalid, he is not in a position to say that the court, the jurisdiction of which he invoked, has no power to render judgment against him for the surplus. See:

A problem similar to the one presented herein was discussed by the Court in *In re Michaelis and Lindeman* (U. S. D. C. N. Y., 1912), 196 Fed. 718. There a receiver sought to bring a turnover order against the Bank in order to recover moneys that the bankrupt had unknowingly deposited with the Bank after an involuntary petition in bankruptcy had been filed against him. The bank contended that the Court had no summary jurisdiction. In reply to this contention, the Court stated in its opinion (196 Fed. at p. 719):

“ . . . This motion requires a somewhat novel application of what I think are elementary principles. It may be assumed, as stated in *In re Zotti* (C. C. A.

Alexander v. Hillman, 1935, 296 U. S. 222, 238, 56 S. Ct. 204, 80 L. Ed. 192; Florance v. Kresge, 4 Cir., 1938, 93 F. 2d 784.

“As said in Alexander v. Hillman, *supra*, 296 U. S. at page 237, 56 S. Ct. at page 209, 80 L. Ed. 192:

“‘The receivers are the court’s representatives and are entitled to have all the property belonging to defendant, and, upon leave, may sue to recover any part of the *res*. The controversies before us arise between respondents who come to share therein and the receivers who not only put in issue the validity of respondents’ claims but allege that they have and refuse to account for a portion of the assets. Undoubtedly the court has jurisdiction of the subject-matter, *i. e.*, *the claims and counterclaims*.’ [Emphasis added.]

“And, while the court there was dealing with receivers, the principle is the same in bankruptcy. See: *Floro Realty Investment Co. v. Steem Electric Corporation*, 1942, 8 Cir., 128 F. 2d 338, 340, 341. The trustee is the representative of the court, entitled to the property belonging to the bankrupt. Bankruptcy Act, 1938, §70, 11 U. S. C. A. §110; *Sampsell v. Imperial Paper Corporation*, 1941, 313 U. S. 215, 217, 218, 61 S. Ct. 904, 85 L. Ed. 1293. It is made his duty to reduce the property to his possession. Bankruptcy Act of 1938, Sec. 2, sub. a(7), 11 U. S. C. A. §11, sub. a(7). And when a claim is presented for a share of this property, the bankruptcy court has jurisdiction to determine its validity, which includes not only objections aiming to defeat it but also to recover, for the estate, any surplus owing the bankrupt.” [Court’s footnote 1 omitted.]

2d Cir.), 26 Am. Bankr. Rep. 234, 186 Fed. 84, 108 C. C. A. 196, that the receiver in bankruptcy is but a custodian without title for the purpose of preservation and not for the purpose of distribution of the estate. Nevertheless he is entitled to take custody of whatever is plainly the property of the bankrupt and against which no third party makes any claim with color of title.

“It may also be admitted that there is no power in the court by summary order to divest a third party of any title (even a fraudulent one) asserted by him against the bankrupt or his trustee. But this does not prevent the entry of a summary order where the only title set up rests, not upon any matter of fact, but upon a statement of law.

“. . . In my opinion, therefore, the mutual account between these bankrupts and their bank of deposit was closed by operation of law the moment petition was filed, and any money thereafter entrusted by the bankrupts to the bank was like a deposit with another person and not subject to any set-off existing before petition.”

The principle of the *Michaelis* case was subsequently approved by the United States Supreme Court in *May v. Henderson* (1924), 268 U. S. 111. There, an assignee for the benefit of creditors, also occupied the position of president of a bank to which the bankrupt was indebted; further, the bankrupt had a deposit account at that bank. Both before and after the filing of the petition in bankruptcy, the assignee-bank president caused the bankrupt's account to be applied to the bankrupt's note to the bank. In a summary proceeding brought to compel the assignee-bank president to pay to the trustee in bankruptcy an amount equal to the deposit of the bankrupt, both before

and after the filing of the petition in bankruptcy, the assignee objected to the summary jurisdiction of the bankruptcy court. The Supreme Court of the United States affirmed the summary jurisdiction of the bankruptcy court in emphatic terms, stating that the claim in that case was merely colorable.⁶

⁶*May v. Henderson*, 268 U. S. at pages 115-117:

“ . . . Courts of Bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of an adverse claim. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the principles of decision here stated. *Mueller v. Nugent*, *supra*; *Schweer v. Brown* (C. C. A. 8th Cir.), 130 F. 328, 64 C. C. A. 574; *Id.*, 195 U. S. 171, 25 S. Ct. 15, 49 L. Ed. 144; *Hebert v. Crawford*, 228 U. S. 204, 30 Am. B. R. 24, 33 S. Ct. 484, 57 L. Ed. 800; *In re Ellis Bros. Printing Co.* (D. C., N. Y.), 19 Am. B. R. 472, 156 F. 430. It may disregard the assertion that the claim is adverse, if on the undisputed facts it appears to be merely colorable. *In re Weinger, Bergman & Co.* (D. C., N. Y.), 11 Am. B. R. 424, 126 F. 875; *In re Rudnick & Co.* (D. C.), 158 F. 223; *In re Ransford* (C. C. A., 6th Cir.), 28 Am. B. R. 78, 194 F. 658, 115 C. C. A. 560; *In re Michaelis & Lindeman* (D. C., N. Y.), 27 Am. B. R. 299, 196 F. 718.) . . . The rule is the same when a creditor secures payment of his debt from the bankrupt's estate after the filing of the petition. A summary order may be made directing repayment of the money to the trustee in bankruptcy. *Knapp & Spencer Co. v. Drew*; *In re Leigh*; *Matter of R. & W. Skirt Co.*, *supra*; *In re Columbia Shoe Co.* (C. C. A. 2d Cir.), 1 Am. B. R. (N. S.) 233, 289 F. 465. A like rule has been applied where a bank secures payment of its debt by setting up its lien or right of counterclaim against a deposit account of the bankrupt or the bankrupt's assignee, created subsequent to the filing of the petition. *Michaelis v. Lindeman*, 196 Fed. 718; *Reed v. Barnett Nat. Bank*, *supra*. See *Farmer's & Mechanics' Bank v. Wilkinson*, Trustee, 266 U. S. 503. Any other rule would leave the Bankruptcy Court powerless to deal in an effective way with those holding property for the bankrupt who, pending the bankruptcy proceedings, wilfully dispose of it by placing it beyond the reach of the court. *Bryan v. Bernheimer*, 181 U. S. 188 61.”

See also the cases of *In re Cuyahoga Finance Co.* (C. C. A. 6th 1943), 136 F. 2d 18; *In re Mauch Chunk Brewing Co.* (C. C. A. 3d 1942), 131 F. 2d 48; *Twentieth Street Bank v. Gilmore* (C. C. A. 4th, 1934), 71 F. 2d 594 at page 597; *In re American Coils Co.* (D. C., N. J. 1947), 74 Fed. Supp. 723.

Accordingly, the bankruptcy court has summary jurisdiction to order the Bank to pay over an amount equal to the sum of the notes and drafts herein; upon the theory that the Bank's withholding of said amount is based merely upon an untenable argument of law⁷ and that the Bank has merely colorable title (which was the first holding of the Referee below), and upon the theory that the Bank voluntarily submitted itself to the jurisdiction of the bankruptcy court by filing its proof of claim in the within proceedings.⁸ The latter theory is supported not only by the *Mercury Engineering* case (discussed at length in footnote No. 5 above) but by *Chase National Bank v. City of New York v. Lyford* (C. C. A. 2d 1945), 147 F. 2d 273. The *Lyford* case involved a railroad reorganization where the bank had set off deposits of the debtor on the day of the filing of a petition under Section 77 of the Bankruptcy Act. The bank later filed a proof of claim showing this offset and requesting the balance owing to it. The Court found that the claim of the bank should be allowed in its original amount and ordered a return to the trustee of moneys equal to the deposits which had been set off by the bank. The Court cited *Alexander v. Hillman*, 296 U. S. 222, to the effect that in an equity receivership the presentation of a claim subjected the claimants to all the consequences that attach to an appearance. The Court went on to state in its opinion in the *Lyford* case, however, that it was not necessary to rely upon the *Alexander* case because the Bank had disclosed in its own claim

⁷See, also, *Bank of California National Ass'n v. McBride*, C. C. A. 9 (1943), 132 F. 2d 769.

⁸See, also, *Gardner v. New Jersey* (1947), 329 U. S. 565.

the fact of the setoff and thus presented the question of its validity to the Court. The opinion of the Court (147 F. 2d at p. 277) states:

“Moreover, here the very claim of the bank, since it disclosed the application of the balance and was for the net amount remaining after such application, presented to the Court the issue of validity of bank’s conduct in applying the balance.”

Precisely this situation was presented to the bankruptcy court in the instant case. The Bank presented its proof of partially secured debt [Tr. 13] and in that proof of debt, the Bank expressly stated that it held “said notes, drafts and bills of lading under its right of offset, counterclaims and banker’s lien.” [Tr. 15.] The Bank, therefore, came into a court of equity and requested payment on its claim by showing in that very claim that it had withheld, under some purported and untenable claim of legal right, property belonging to the debtor.

The Bank submitted its entire course of dealings with the debtor to the approval of the Court and invoked the jurisdiction of the Court to approve those dealings and to order the payment of moneys to the Bank. Under the authorities hereinabove cited, it is now well-settled law that the bankruptcy court had summary jurisdiction to order the Bank to return the notes and drafts, or the amount thereof, to the receiver for the debtor. As against the unequivocal holdings of these authorities, the Bank has cited no cases.

Conclusion.

In its Brief, the Bank has taken mutually inconsistent positions. On the one hand, it argues that the language of the California Statute is clear and unequivocal and that, therefore, any state of facts which might technically fit within the language of that statute is, will entitle the Bank to the fruits of the lien. On the other hand, the Bank cannot ignore the many cases cited by the appellant (some of those cases having been referred to in the very notes of the Commissioners who drafted and recommended the adoption of Code of Civil Procedure Section 3054), to the effect that the lien does not apply in a variety of situations where no credit was extended upon the faith of the items although held in the custody of the Bank. The Bank concludes that in such cases (as for example, where property is pledged for a specific debt, or is in a safe deposit box, or is in the hands of the Bank as an escrow holder, etc.) the strict wording of the statute does not apply. These are described as "exceptions." It is the contention of the appellant that these so-called exceptions are explained by the language and theory of the leading cases on the subject. There must be an extension of credit in reliance upon the notes and drafts, or other property, and without such extension of credit, the banker's lien does not apply. Where no credit is extended and the Bank takes the paper for collection only, it is a mere agent; it has no interest in the paper, can assert no lien thereon, and is subject at all times to the directions of its principal.

The Bank never had true possession of the notes and drafts. Where credit is extended on the faith of notes

and drafts placed with a bank for collection, the bank is in a position to contend that it has possession of those notes and drafts in the sense that the concept of possession is understood in the law. But, as has been pointed out in Appellant's Opening Brief and herein, where the Bank is merely an agent for collection, it has only bare custody subject to the direction of its customer; the agency of the bank to collect the notes and drafts is terminable at the will of the principal.

It is submitted that the orders of the Court below should be reversed; that the objections of the receiver to the claims of the Bank of America be sustained; and that the Bank be ordered to forthwith pay to the estate the sum of \$178,950.93.

Respectfully submitted,

GENDEL & CHICHESTER and
BERNARD SHAPIRO,

By MARTIN GENDEL,

*Attorneys for Appellant, George T. Goggin, Receiver
of the Estate of Salsbury Motors, Inc., Debtor.*

No. 12206

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Receiver of the Estate of Salsbury
Motors, Inc.,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSO-
CIATION,

Appellee.

PETITION FOR REHEARING.

FILED

MAR 23 1950

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Appellee.

PETITION FOR REHEARING.

*To: The Honorable Judges of the United States Court
of Appeals for the Ninth Circuit:*

Your petitioner herein, George T. Goggin (hereinafter referred to as "Receiver"), as receiver in bankruptcy of the estate of Salsbury Motors, Inc. and appellant herein, respectfully petitions this Honorable Court for a rehearing in the above entitled matter, the judgment of this Court having been rendered herein on February 23, 1950, with a written opinion by Judge Stephens after a hearing before Judge Stephens, Judge Pope and District Judge McCormick.

Introduction.

The statute involved is Section 3054 of the Civil Code of the State of California which reads as follows:

“A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business.”

The opinion of this Court seems to admit that there was no express extension of credit (“It is true that no credit upon specific items was given upon the delivery of any of the collection items to the Bank, nor had such credit been given or asserted prior to the institution of these proceedings . . .”) upon the delivery of the commercial paper involved; therefore the relationship admittedly commenced with the Bank having *custody* of the paper, not possession, and the parties were in the position of principal and agent. Did this situation change factually or by legal effect? Appellant earnestly contends there was no change and respectfully challenges the finding of this Court that if the debtor impliedly agreed to do all of its banking with the Bank that this was an implied agreement to give the Bank a lien upon all commercial paper delivered for collection only. This reasoning would constitute a conclusion unwarranted by the hypothesis involved. Would the agreement to give the Bank all of its banking business forbid the debtor from collecting its own commercial paper and thereby save the Bank’s charges? Obviously this Court did not and cannot find an implied agreement that the debtor would place its commercial paper with the Bank, so logic compels a denial of the entire basis apparently relied upon by this Court in drawing the unwarranted conclusion that by agreeing to give the Bank its

banking business, it gave the Bank a banker's lien on all property in its custody. If the Bank had allowed the debtor to draw in advance upon the commercial paper involved, this would be ". . . in the course of the business" of a Bank, but the simple collection of commercial papers can be handled by an owner, a bank, a collection agency or an attorney, and cannot be considered as the banking business intended by Section 3054 of the California Civil Code; nor could there ever be any balance due the Bank in the course of that business because no creditor-debtor relationship is ever created.

Grounds for Petition.

This petition for rehearing is based upon the following grounds:

A. The opinion of this Court makes an implied finding that credit was extended by the Bank upon the faith of the debtor's notes and drafts. This implied finding is contrary to the evidence, to the express stipulation of the parties and to the findings of the Referee.

B. The opinion in the instant case extends the banker's lien beyond its rightful scope in that a borrower who is persuaded to use all of the bank's facilities (to the profit of the bank) will be held to have subjected his property to the banker's lien even though credit was never advanced in reliance upon that property.

1. This phase of the opinion herein is particularly harmful in chapter and bankruptcy proceedings, since the banks obtain a secret lien and a preference as to property commonly believed by other creditors to be available for the payment of debts.

2. The extension of the banker's lien in the instant case is without legal or equitable justification for the reason that the banks persuade borrowers to use all banking departments as a means of obtaining business and profits; thus, the banks acquire fees for the use of their services and an alleged lien by implication as well.

I.

No Credit Was Extended by the Bank Upon the Faith of the Notes and Drafts Involved in the Instant Case.

The Opinion of this Honorable Court in the present appeal (Printed Opinion pp. 3-4) contains the following statement:

“The facts of the case, succinctly stated by counsel, indicate that Salsbury was doing a rather large continuing general banking business with the Bank and that when the Bank entered upon the loan arrangements with Salsbury it fully expected this relationship to continue for the mutual business benefit of both parties under their common knowledge that the securities left with the Bank by Salsbury were a part of the business, all of which constituted the basis for the credit given. To that extent the advances were made upon the credit of the very items proceeds of which are here claimed by the receiver.”

In the above quoted paragraph, this Court was referring to a stipulation of facts made by counsel for the Receiver and counsel for the Bank at a hearing before the Referee on the question of summary jurisdiction. [Tr. p. 104.] Counsel for the Bank expressly stated at that time that the stipulation was “for the purpose only of this pro-

ceeding to determine, that is to permit the Court to determine whether or not there is a color of title in the bank on this objection to this petition.” [Tr. p. 108.] The referee ultimately decided that there was summary jurisdiction in the bankruptcy court to decide the questions involved in the receiver’s objection to the Bank’s claim; indeed, the referee decided, presumably upon the basis of that stipulation, that “the Bank of America had not extended to the Debtor any credit upon the faith of said note of Jacques Power Co. . . .” [Tr. p. 45.] This stipulation was pertinent to the present appeal since the Bank had raised the question of summary jurisdiction before this Court. (Appellee’s Br. p. 27, *et seq.*)

Thus, although the parties stipulated, for the purpose of determining summary jurisdiction and for that purpose only, that there was “apparently an implied understanding,” that all of the debtor’s usual banking transactions would be handled through the Bank, there was never any implication, intended or otherwise, of advancement of credit upon the faith of the notes and drafts. The referee, as trier of fact, drew the opposite inference. As will be related in greater detail below, even when the referee eventually ruled that the banker’s lien entitled the Bank to seize the notes and drafts, he was unable to find any extension of credit.

Another stipulation of facts was drafted, in more formal fashion, for the determination on the merits. The governing stipulation on the question of the advancement of credit begins on page 68 of the Transcript herein. In that stipulation, the matter of credit is handled as follows:

“None of the notes and drafts or bills of lading accompanying the same deposited by the debtor with claimant as collection items during the course of the

operation of the business of the debtor from the time of the loan agreement on February 18, 1946, to the date of filing the petition in the above-entitled proceedings was at any time pledged by the debtor to secure any indebtedness of the debtor to claimant. No immediate credit was given by claimant to the deposit accounts of the debtor upon the deposit of any of said collection items but all of said items were deposited with claimant for collection and credit of the proceeds of the collection to the deposit account of the debtor when said collections were completed. During the period from February 18, 1946, to August 19, 1947, claimant did, in the usual course of business, credit to the deposit account of the debtor, as and when received, the proceeds of all collection items in accordance with the instructions of the debtor. In each of the collection items in the hands of claimant on August 20, 1947, the debtor had issued and claimant had accepted instructions to credit the proceeds of said collections when received to the commercial deposit account of the debtor." [Tr. p. 76.]

The referee made a finding of fact based upon this stipulation and his finding was worded in substantially identical form. [Tr. p. 89.] Accordingly, it is clear that the referee below, as the original trier of facts, scrupulously avoided the making of any finding that credit had been extended upon the faith of any of the notes and drafts involved in the present controversy. Instead, the record indicates that the referee based his ruling upon a purely mechanical interpretation of Section 3054 of the California Civil Code and upon a dictum of the Supreme Court of California in the case of *Gonsalves v. Bank of America* (1940), 16 Cal. 2d 169. The receiver does not wish to be understood as contending that this Honorable

Court is in any way required to reverse a judgment because the court below has relied upon an erroneous interpretation of the law. But the receiver does strenuously assert that the trier of facts in the instant case carefully and consistently avoided any finding to the effect that credit had been extended upon the faith of the notes and drafts here involved; rather, it is clear that the referee was unable to find any such extension of credit.

It is also significant that the Bank has never seriously contended that credit was extended upon the faith of these notes and drafts. At the outset of its brief before this Court, the Bank indicated that it would prove that "general credit" had been extended to the debtor:

"The general course of dealings hereafter discussed will indicate that under the authorities there would be a presumption that general credit was extended to the Debtor upon the basis of that course of dealing."
(Appellee's Br. p. 2.)

One may then search the remainder of the Appellee's Brief in vain to unearth any indication of a state of facts showing that general credit had been extended to the debtor herein. In fact, the Bank's principal argument was to the effect that, as a proposition of general law, a bank is entitled to a banker's lien upon collection items which have been placed in the hands of the bank for collection only. (Appellee's Br. pp. 4-11.) Subsequently, the Bank demonstrated the meaning of its earlier statement that "there would be a presumption that general credit was extended to the Debtor upon the basis of that course of dealing." (Appellee's Br. p. 2.) The Bank stated:

" . . . The very words quoted so often 'supposed to have been made' indicate not that advances must be made but rather that there is a presumption that

‘advances have been made upon the credit of the securities in the bank’s possession.’ ” (Appellee’s Br. p. 15.)

Thus, the Bank relied not upon any actual extension of credit but upon its interpretation of the authorities allegedly holding that where an individual owes money to a bank and has securities in the hands of the bank, *these two factors compel a presumption that there have been advances made upon the faith of the securities in the hands of the bank.* As was later pointed out in the Receiver’s Reply Brief, the Bank’s own authorities demonstrated the error in its position (pp. 4-7).

The foregoing outline of the record and arguments before this Court has been presented for the purpose of demonstrating that at no time did any party specifically urge or prove any extension of credit, actual or implied, upon the faith of the notes and drafts involved herein; and the referee was unable to find any such advances. His only findings in this regard were that at no time had the notes and drafts been pledged as collateral and that no immediate credit had been extended. After collection, of course, the proceeds were reflected in the debtor’s commercial account. It was believed that the issue was thereby clearly and narrowly defined. The Bank, supported by the courts below, contended that the mere dual facts of indebtedness plus notes and drafts in its custody gave rise to the lien. The Bank strenuously urged that the advancement of credit is not a requisite for the application of the banker’s lien but that such credit will be *presumed* as a sort of legal fiction. The receiver, on the other hand, urged with equal vigor that the banker’s lien springs from the law merchant and that there are certain requi-

sites for its enforcement. The receiver cited cases to show that the mere facts of indebtedness, plus property of the debtor in the hands of the bank, does not give rise to the exercise of the banker's lien. There are many situations (such as a pledge for a specific indebtedness, property held in trust, property held in safe deposit boxes, property in escrow, etc.) where the banker's lien is inapplicable because no advances have been made upon the faith of this property. And the receiver cited many cases in which the banker's lien was held inapplicable to notes deposited with a bank for collection only *where no credit had been advanced*. We do not believe that it is necessary to restate all of these cases since they are contained in the Appellant's Opening and Reply Briefs. The facts of the present case compelled this narrowing of the issues; the Bank was forced to its position that the banker's lien is applicable irrespective of advances of credit made upon the faith of the property in its hands *for the reason that there had been no such advances*.

For the reasons hereinabove stated, the receiver respectfully submits that this Honorable Court has grounded its disposition of the instant appeal upon an implication that is contrary to the stipulated facts, to the Findings of Facts by the courts below and to the understanding, as well as to the arguments, of counsel for both sides. It is further earnestly and respectfully submitted that the true issue in the present case is one of great significance to the administration of the bankruptcy laws, namely, whether notes and drafts in the hands of a bank for collection only are subject to the banker's lien at the "date of cleavage" where no credit has been advanced upon the faith of those notes and drafts.

It is important that this issue be decided squarely.

II.

Even Assuming an Implied Understanding That All of the Debtor's Usual Banking Transactions Would Be Handled Through the Various Departments of the Bank of America, Still This Would Not Constitute an Implied Reliance Upon the Notes and Drafts.

While the issue as outlined heretofore in this PETITION is of great importance in every bankruptcy, the Opinion of this Honorable Court in the present case has raised an issue of even higher significance. If the receiver correctly interprets the Opinion herein, it appears that a very common business practice will result in grave injury to the non-bank creditors of a debtor or bankrupt. It is by no means unusual that a bank should desire and encourage a borrower to use all of the facilities and departments of the bank. If a bank lends money to a business man, it can and doubtless will advise him that the bank expects to obtain the borrower's collection business, if any. Such a proposal would not startle business men who have dealt with banks. But if such an amicable understanding were reached between a borrower and a bank, would this mean that the business man has received such credit, implied or otherwise, upon the faith of notes and drafts deposited with the bank's collection department as would satisfy the historic and present requirements of the banker's lien?

In his earlier briefs before this Court, the receiver has demonstrated that under the cases, the banker's lien is considered to be in the nature of an "implied pledge." (Appellant's Op. Br. p. 27, fn. 9.) Even where the property has been placed in the hands of the bank as collateral for a specific extension of credit, the property cannot thereafter be seized where the particular loan has been repaid

and another indebtedness to the bank is later incurred. (Appellant's Op. Br. pp. 35-39, fn. 16-20.) The authorities heretofore mentioned demonstrate that the historic function of the banker's lien has been to secure the bank for advances *actually made upon the credit of the particular property involved*.

As stated by this Honorable Court in its opinion herein, the function of the banker's lien under the law merchant has not been broadened by statute. It is therefore essential to compare the strict limitations historically placed upon the exercise of the lien with the broad extension authorized by the opinion of this Court. In all of the cases cited by the receiver in his briefs, where the lien was claimed but not allowed, the customer owed a debt to the bank. Yet, the courts refused to hold the lien applicable because no credit had actually been extended upon the faith of the notes and drafts or other property in the hands of the bank—or credit had been advanced but the particular loan repaid.

A borrower from a bank is easily persuaded to use all of the bank's functions. Business men often desire, of their own accord, to transact all of their business with one bank where they are well known. Further, the bank in turn is more prone to extend credit to its own regular customers, other things being equal. But this does not mean that the bank has extended credit upon the faith of all of the borrower's property in the bank's hands, within the meaning of the requirements of the banker's lien. Such an argument would ignore the most basic facts of commercial life.

Where banks rely upon security, they carefully so provide in their lending agreements. Of course, the setoff of deposits is by now a well established legal and business

proposition. As to all other forms of security, the banks are prone to be specific in writing. Witness, for example, the lending agreement herein; the trust deed was taken as security and it was to secure not only past, but future, loans as well. [Tr. pp. 13-36.] If the Bank in the present case had extended any credit upon the faith of the notes and drafts taken for collection only, there would doubtless have been a provision to this effect in the lending agreement.

The Bank of America in the present situation made its profit from the collections of the notes and drafts in its custody without any risk on its part. The Bank earned substantial fees from the extensive collections made for Salsbury Motors. This would normally be deemed to be its own reward. Thus, it is more logical to assume that any understanding that the Bank's collection department would be used for the collection of notes and drafts of Salsbury was predicated upon the fees to be charged by the bank for such collections.

Accordingly, there is an enormous difference between an actual extension of credit upon the faith of notes and drafts as evidenced by entries in the deposit account of the borrower, and a mere understanding that the borrower will use all banking functions of the lender in order to swell the bank's fees. It is not unnatural that large scale borrowers will be encouraged to use other departments of a bank—and a borrower may expressly agree to do so, either to ingratiate himself to the lender or to suit his own convenience. But the vast difference between such an arrangement and an extension of credit upon the faith of, for example, the placing of notes and drafts with the bank for collection only, will be clear upon the answer to this

question: Is it conceivable that the Bank actually extended credit upon the faith of these notes and drafts and yet did not mention them in the lending agreement?

Further, the collection department of a bank is not the only one that would be used by a borrower who had been advised to place all of his patronage with the bank. Certain active business men who have occasion to borrow from a bank, use escrow services extensively. It would not be unusual for the Bank to urge this borrower to use the Bank of America's Escrow Department. The motive for this would be logically explained as the desire to collect escrow fees upon the numerous transactions engaged in by this particular borrower. But does it mean, in addition, that upon bankruptcy or insolvency the Bank is entitled to assert a banker's lien upon any amount or property belonging to the borrower then in the hands of the Bank's Escrow Department? The cases are clear that the Bank cannot assert its banker's lien in this situation. (See cases cited, Appellant's Op. Br. fn. 17, pp. 37, 47; Appellant's Rep. Br. pp. 9-10.)

It is equally true that certain borrowers are large scale users of safe deposit boxes and safe deposit vaults. For certain individuals the fees for such custodial services are quite material. Thus, the Bank could and would encourage a borrower to use the safe deposit and safe deposit vault facilities extended by it rather than by a competitor. This does not mean that the items so placed in the custody of the Bank and belonging to the borrower shall be subject to the banker's lien for the payment of the original loan. (Appellant's Op. Br. pp. 26-27, fn. 9.)

Thus, even though it is possible that the borrower places notes and drafts with the bank for collection, or uses a

bank's escrow service, or uses a bank's custodial services, at the urging of the bank at the time of the making of a loan, this does not mean that the notes or drafts or other property so deposited in the usual course of other phases of the borrower's business shall be subjected to the banker's lien upon insolvency or bankruptcy.

In all of these cases the bank is merely urging the use of its facilities rather than those of a competitor in order to gain added revenue. If the parties intend the property so deposited in the hands of the bank to be collateral or security for the debt, they should so state in the loan agreement. The banker's lien has never been used for this purpose and it should not be so extended contrary to the manifest understanding of business men generally. This construction of the banker's lien would create a preference or secret lien in favor of banks contrary to the express intention of the Bankruptcy Act. Creditors dealing with a business man who has borrowed from a bank are generally mindful of the fact that deposits with that bank are subject to the rights of setoff in the event of bankruptcy or insolvency. But we submit that no creditor would believe that notes and drafts in the hands of the bank's collection department for collection only, where no credit had been extended on the faith of such notes and drafts, would be subject to a banker's lien. Under the Opinion of this Court there has been born a new type of secret lien, at least as pernicious as the type struck down by the Supreme Court of the United States in *Corn Exchange National Bank & Trust Co. et al. v. Klauder* (1943), 318 U. S. 434,

63 Sup. Ct. Rep. 79. In that case the Supreme Court clearly expressed the policy of the courts and the Bankruptcy Act against any such secret lien. In the present case there is even less equity in favor of the Bank. The Bank extended no credit and suffered no detriment in so far as these notes and drafts are concerned. The Bank has obtained a windfall over and above its right of deposit of setoff and the real property described in the trust deed, to the disadvantage of all of the general unsecured creditors of this debtor.

Accordingly, even if it can be assumed that there was a general understanding that the borrower would use the bank's facilities for all of its business, that understanding gives rise to no implication that the Bank relied upon the notes and drafts placed in its hands for collection only. Banks are well able to protect themselves when they lend money and are accordingly prone to set forth in their loan agreements the full security upon which they in truth rely. Where a bank actually extends credit upon the faith of notes and drafts, that credit will be evidenced either by a regular discounting procedure, by allowing the depositor to draw checks against anticipated collections, or by a pledge or other loan agreement. Where there has been no discounting and there has been no pledge, one may safely assume that there has been no extension of credit upon the faith of these securities. It is urgently submitted that the finding of an extension of credit in the present case, even assuming an apparent agreement by the debtor to use all of the Bank's facilities, is wholly unwarranted and extremely prejudicial to the other creditors of this debtor.

Conclusion.

At the risk of reiteration we must vigorously contend that this Honorable Court has wholly failed to pass upon the true issues before it. Where counsel have vigorously presented an exhaustive search of points and authorities, and where the referee below and the district court have made their findings of fact, all upon issues other than the findings of fact now urged *de novo* by the appellate court, it is counsel's duty to respectfully call to the attention of this Court that it is not the jurisdiction or authority of an appellate court to act in the capacity of a trier of fact.

No contention was, or could be, raised, by reason of the stipulated facts or testimony or exhibits, that there was an actual agreement involving the extension of credit in reliance upon the handling of the collection of the notes and accounts receivable involved in the within proceeding. Therefore, there are no substantial facts in the record which could sustain the factual recitation made by this Honorable Court in its opinion entered as of the 23rd day of February, 1950.

The Bank cited the case of *In re Farnsworth* (1873), Fed. Case No. 4673, 5 Biss. 223, decided in the District Court in Illinois without any reasoning given for its opinion, and the dictum in three distinguishable cases, to-wit: *Kane v. First Nat. Bank of El Paso* (C. C. A. 5, 1932), 56 F. 2d 534; *Half Moon Fruit & Produce Co. v. Floyd* (C. C. A. 9, 1932), 60 F. 2d 799; *Gonsalves v. Bank of America* (1940), 16 Cal. 2d 169, as the basis for a contention that the notes and drafts were in the hands of the Bank of America and therefore constituted assets upon which the Bank could exercise a banker's lien. In contrast to this paucity of authority, the receiver has presented

numerous authorities, including the unequivocal statements of the United States Supreme Court, to the effect that although a bank may have custody of notes it cannot exercise a banker's lien unless it has expressly extended credit in reliance thereon.

This Honorable Court in its opinion announced the true rule of law that in collecting the notes at the time of the commencement of the bankruptcy proceedings herein the debtor corporation and the Bank were in the status of principal and agent respectively. We earnestly and sincerely contend that the relationship was automatically "frozen" as of the commencement of bankruptcy. In *Goggin v. Division of Labor Law Enforcement* (1948), 336 U. S. 118, the Supreme Court of the United States expressly held that the legal relationship of the parties dealing with a debtor or bankrupt cannot be changed after the commencement of the bankruptcy proceedings. Although this legal point is apparently considered by this Honorable Court in its opinion, its effect is declared immaterial by an unwarranted new finding of fact that there was an implied or unspoken understanding between the debtor and the Bank that the Bank would handle its collection business. Such an agreement, admitted for the purposes of argument on this Petition for Rehearing, has no relationship whatsoever to the true fundamental legal question, and that is whether or not a banker's lien exists where the notes are held by a bank in its custody on a principal-agent relationship, and without any extension of credit.

All that the debtor could have agreed to from the facts recited by this Honorable Court in its Opinion, was to allow the Bank to collect its notes, and if collected, to deposit the proceeds in its commercial account. Bankruptcy proceedings intervened before collection was effected, and

therefore the rights of the parties were frozen. By no stretch of law, equity, or otherwise could this Honorable Court be justified in finding that the Bank, contrary to the rights of all other creditors, is entitled to continue to enforce the alleged implied agreement, collect the notes, deposit the 'proceeds in' the non-existent commercial account of the debtor, and then claim a belated banker's lien. Recognition of such an interpretation of law is a bald and outright recognition of a voidable preference. If there was an executory contract wherein the Bank was entitled to collect commercial paper, this agency was expressly terminated by the receiver as well as by force of law.

With the permission of this Court, we filed a supplemental brief which quoted in full the attitude of Congress against extending any additional protection to banks, particularly in reference to the advancement of moneys upon accounts receivable; this Honorable Court has not seen fit to determine whether the notes of the debtor, representing all of its accounts receivable and not negotiated by the Bank but merely handled by it for collection only, are such accounts receivable as are covered by the intent of Congress and the provisions of the Uniform Negotiable Accounts Receivable Act reflected by Section 3017 of the California Civil Code and the sections following. The Feb. 23, 1950, Opinion fails to comment upon this point.

If we have correctly construed the Opinion of this Honorable Court, there has been no determination of the fundamental legal question as to the scope and operation of the "banker's lien" when bankruptcy has intervened; this was the sole issue before the Referee and the District Court and, we respectfully submit, in this Court. Thus, the Opinion gives no assistance or guidance to Bankruptcy

Courts that have been and will be faced with this problem. By reason of the tremendous importance of this question to the administration of the Bankruptcy Act, this may well be a case in which this Court should certify the question to the Supreme Court of the United States for determination. Surely judicial notice may be taken of the fact that banks are creditors in almost all bankruptcies involving commercial enterprises, and that in most of these cases the banks, at the time of the commencement of the bankruptcy, have custody of certain of the credits, or assets of the bankrupt.

The Supreme Court of the United States has most emphatically stated that in bankruptcy proceedings there is no such creature as an "equitable lien" and this is reflected by opinions such as the *Corn Exchange National Bank v. Klauder*, *supra*, and in innumerable other decisions both before and since that date. We respectfully contend that the within Opinion of this Honorable Court does afford the Bank an "equitable lien" without expressly denominating it as such. Banks, in making loans, are very similar to insurance companies issuing policies on their printed forms; they do not need, nor deserve, the extraordinary protection of any court, especially where such protection results in an unwarranted preference over other creditors by implying an agreement which could not be enforced as a statutory lien but must be truthfully denominated an equitable lien not recognizable under our bankruptcy law as reflected by the Bankruptcy Act, as amended, and the interpretations placed thereon by the Supreme Court of the United States.

We respectfully and sincerely urge this Court to grant a rehearing and to reconsider its Opinion in light of the comments contained herein, and to make and enter an

opinion which correctly reflects a recognition of the findings of the triers of the facts in the courts below, and which applies the applicable law to these facts. As heretofore urged, we believe that such a procedure must result in a reversal of the rulings of the referee and the district court.

Dated this 23rd day of March, 1950.

Respectfully submitted,

GENDEL & CHICHESTER and
BERNARD SHAPIRO,

By MARTIN GENDEL,

*Of Counsel for Appellant, George T. Goggin, Receiver of
the Estate of Salsbury Motors, Inc., Debtor.*

Certificate of Counsel Under Rule 25.

I certify that in my judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

Dated at Los Angeles, California, March 23, 1950.

MARTIN GENDEL,

No. 12206
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Receiver of the Estate of Salsbury
Motors, Inc.,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS AS-
SOCIATION,

Appellee.

REPLY TO APPELLANT'S PETITION FOR
REHEARING.

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CLERK

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No. 12206

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Receiver of the Estate of Salsbury
Motors, Inc.,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS AS-
SOCIATION,

Appellee.

REPLY TO APPELLANT'S PETITION FOR REHEARING.

Pursuant to the order of this Honorable Court withdrawing its opinion heretofore filed and granting appellant's petition for further consideration of the cause, appellee respectfully submits its reply to the legal points made in Appellant's Petition for Rehearing.

Appellee respectfully suggests that this Honorable Court's affirmance of the order of the Referee and the judgment of the District Court was correct upon the grounds stated in the Court's opinion and upon other grounds stated in the briefs. As the Court has indicated a desire to consider the matter further, appellee is appreciative of the opportunity of a reply to the appellant's arguments in the Petition for Rehearing.

Any point of law predicated upon the common law and particularly the law merchant has become a difficult one. Lawyers and even the courts have become used to statutory law. When so many of the early principles of the common law have been embodied into codes in most jurisdictions, the ability to rely upon the statutory provisions and decisions of the courts under them in most situations has put lawyers and courts alike out of practice in ferretting out and distinguishing the technicalities and niceties of the decisions of the courts of a hundred or a hundred and fifty years ago.

It is not altogether surprising, therefore, that in a case such as this the briefs of both parties, taken together, have failed to present the matter to this Court in a manner sufficient to enable the Court to weigh the issues and decide them with conviction. It will be our aim in this brief to present as clearly and as fairly as may be done what we consider the correct legal principles applicable to the facts of the case.

Appellant's Petition for Rehearing urged two grounds:

First: That this Court's conclusion was based upon an implied finding which was contrary to the evidence in the case, to the express stipulation of the parties and to the findings of the Referee.

Second: That the Court's former opinion extends the banker's lien beyond its rightful scope without legal or equitable justification, and that this phase of the opinion is particularly harmful in bankruptcy proceedings because it permits banks to obtain a secret lien and a preference.

We will answer the legal points made in appellant's brief in support of these grounds.

POINT I.

The Stipulated Facts Justify the Conclusion That Credit Was Granted Upon the Expectation and Implied Agreement That Collection Items Would Be Deposited With the Bank.

The gravamen of appellant's first ground appears to be that the Court made an implied finding that credit was extended by the Bank upon the faith of the debtor's notes and drafts and that this implied finding is contrary to the evidence, and the petition asserts that this Court was unwarranted in making such a finding which was contrary to the findings of the court below.

The opinion of this Court pointed out the existence of a stipulated fact, namely, that there was an agreement made between the Bank and the debtor, upon the extension of credit by the Bank, that collection items of the debtor would be handled through the collection department of the Bank. From this stipulated fact this Court determined that as a matter of law the credit extended by the Bank to the debtor was made upon the faith that the notes and drafts and collection items would be deposited with the collection department of the Bank in all future transactions, and that this expectation and agreement was sufficient to satisfy any requirement that in order that a banker's lien attach to securities in the hands of a bank there must be an extension of credit upon those items.

Although the petition urges that this Court cannot find an implied agreement that the debtor would place its commercial paper with the Bank (Pet. p. 2), such an agreement is admitted for the purposes of argument on the petition for rehearing (Pet. p. 17). The existence of such an agreement is clearly demonstrated by the record

and was properly considered by this Court even though it was not included in the findings of the Referee.

The statement made at the hearing before the Referee [R. 104] was clear and unequivocal. It stated that there was an implied understanding between the Bank and the debtor that all usual banking transactions would be handled through the Bank and further that "the implied understanding included that as to collections or notes or sight drafts or bills of lading that they would be handled through the collection department of the Bank of America."

It is true, of course, that the stipulation of facts was stated to be only for the purpose of the pending proceeding to determine summary jurisdiction of the Referee. It was nevertheless a stipulated fact made with the intention that the Court should rely upon it, and it is part of the record on appeal at the request of appellant himself.

It was urged in the Receiver's specifications of objections to findings of fact, conclusions of law, and order allowing claim that reference should be made to the oral stipulation in the Jacques Power Saw matter [R. 101]. It was asserted in the petition for review [R. 93] that the order was erroneous because "the findings of fact fail to include the evidence introduced before this Court by oral stipulation in the hearings on the Jacques Power Saw Company matter, held before this Court on December 2, 1947."

The implied agreement contained in the oral stipulation was not cancelled or superseded by the subsequent written stipulation of facts appearing at pages 70-71 of the Record. Nor is the subsequent stipulation of facts inconsistent with the oral stipulation made at the hearing on December 2, 1947. On the contrary, the facts stated

in the written stipulation [R. 70-71] establish a rather compelling inference that the general credit under the loan agreement was extended upon the implied understanding that the general course of dealing would be embarked upon and would continue, and of course the facts show that it did.

The existence of the agreement that collection items would be handled through the Bank as part of a general course of dealing agreed upon at the time of the extension of credit is not inconsistent with any finding of the Referee. The memorandum opinion of the Referee [R. 79] indicates that the evidence showed that it was the practice of the debtor to place sight drafts and other commercial paper with the Bank for collection and that the proceeds would be credited to the account of the debtor when collected. The Referee's findings [R. 83] show, in accordance with the stipulation of facts, that in the *regular course of business* drafts were deposited for collection and were collected and deposited to the debtor's account. The findings and the stipulation of facts also show [R. 89] that in each of the collection items in the hands of appellee at the time of filing the petition there were specific instructions to collect the items and to credit the proceeds when received to the commercial account of the debtor.

The Receiver argues that the original trier of the facts scrupulously, carefully and consistently avoided any finding to the effect that credit had been extended upon the faith of the notes and drafts involved in this proceeding (Pet. for Rehearing, pp. 6-7). This contention is not borne out by the record. In his specification of objections to the findings of fact, conclusions of law and order allowing claim [R. 101] the Receiver specifically requested that

there should be added to Finding VIII [R. 89] the following language:

“However, no credit had been extended in reliance upon said collection items, and no part thereof had been collected on August 20, 1947, when the Receiver demanded the return of the collection items.”

While it appears that these objections and the request for the specific finding may not have been received by the Referee until after the findings had been signed [see letter 4-16-48, R. 100], they were specifically made a part of the petition for review [R. 93, 99, Item 15] and were apparently considered and expressly overruled by the District Court [R. 110]. It is apparent from this that counsel's assertion that the trier of the facts scrupulously avoided a finding that credit had been extended upon the faith of the notes and drafts is not correct. The Record would more nearly indicate that the Referee and certainly the District Court declined to make the finding requested by counsel, which, it is asserted, is the very basis of the Receiver's case.

In any event, there is no legal or equitable reason why under these circumstances the fact of the existence of the agreement which is actually in the record before this Court should not be taken into consideration by the Court in its decision in the case. The rule is that where there is no conflict in the testimony the Appellate Court has the power and the duty to review the evidence and form its independent judgment upon the sufficiency thereof.

Carr v. Southern Pacific Co. (C. C. A. 9, 1942),
128 F. 2d 764, 768;

Security Building and Loan Assn. v. Spurlock (C.
C. A. 9, 1933), 65 F. 2d 768, 770.

The rule is well established that where the facts are admitted or otherwise undisputed, the Court of Appeals may make its own judgment without dependence upon the findings of the trial court (see *Sheldon v. Waters*, 168 F. 2d 483 (C. C. A. 5, 1948); *Stewart v. Ganey*, 116 F. 2d 1010 (C. C. A. 5, 1941); *In re Chicago and North West Railway Co.*, 110 F. 2d 425 (C. C. A. 7, 1940); *United States v. Anderson*, 108 F. 2d 475 (C. C. A. 7, 1939) (findings based on documentary evidence and stipulations); *Quinn v. Union National Bank*, 32 F. 2d 762 (C. C. A. 8, 1929); *Elbro Knitting Mills v. Schwartz*, 30 F. 2d 10 (C. C. A. 6, 1929) (findings based on stipulations and undisputed evidence); *Walton v Atha*, 262 Fed. 75 (C. C. A. 3, 1919).

This Court's conclusion that the general course of dealing between the bank and the debtor and the expectation that collection items would be deposited with the bank pursuant to the implied agreement was the equivalent of present consideration, if any was required to establish a banker's lien, is amply supported by the authorities. We propose to discuss the cases in detail at a later point in this brief, and that discussion will show that the language quoted here is pertinent to the facts of the particular case. In order to clarify and to conclude the discussion of this point, we quote from some of the decisions upon this point.

Bank of the Metropolis v. New England Bank,
1 How. (42 U. S.) 234-239, 11 L. Ed. 115
(1843).

"We do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other, credit is given upon the paper deposited or *expected to be trans-*

*mitted in the usual course of the transactions between the parties.”*¹

In *Russell v. Haddock*, 8 Ill. (3 Gil.) 237, 242 (1846), referred to in the former opinion of this Court for the proposition that there must be a credit upon securities in possession or expectancy, the Court said:

“If they placed funds in the hands of Smith & Co. in either of these modes it was upon the faith of the securities already on hand *with the expectation that they would continue to remit paper for collection as formerly* * * *.”

In *Citizens Bank and Trust Co. v. Yantis* (Tex. Civ. App.), 287 S. W. 505, 508 (1926), the Court said:

“Credit is given upon the faith of the mutual dealings and upon the contemplation of paper deposited or *expected to be delivered in the usual course of the transactions* between the parties. So, if the balances are allowed to stand uncollected and the debt allowed to be constantly renewed and extended, by express agreement, the law will apply the same rule to the rights of the parties as though there had been an express agreement, and such mutual indulgences on such balances would create a valid consideration and give the bank the right to retain and apply the balance due on closing the account.”

The record in the present case shows not only a general course of dealing in which collection items were deposited for collection and credit to the debtor’s account, but it also shows that loans were allowed to stand uncollected and that the indebtedness of the borrower was renewed and extended. The stipulation of facts shows that fol-

¹Throughout this brief, emphasis added unless otherwise noted.

lowing the original loan agreement on February 18, 1946, the agreement was amended to provide for an additional *revolving credit* of not to exceed \$450,000 for the period of one year [R. 82].

In *Gibbons v. Hccox*, 105 Mich. 509, 63 N. W. 519 (1895), the Court said:

“The reason given for allowing the lien is that any credit which a bank gives by discounting notes or allowing an overdraft to be made is given on the faith that *money or securities* sufficient to pay the debt *will come into the possession of the bank in the due course of future transactions.*”

In *Greene v. Jackson Bank*, 18 R. I. 779, 30 Atl. 963 (1895), where notes were left with a bank for collection, the Court said the bank had a lien, “the presumption being that its advances to him were made on the credit of such securities.”

In *Central National Bank v. Connecticut Mutual Life Insurance Co.* (sometimes cited *National Bank v. Insurance Co.*), 104 U. S. 54, 71, 26 L. Ed. 693, 701 (1881), a case also referred to in this Court’s prior opinion, the Court made the statement that the lien attaches upon securities deposited in the usual course of business “for advances which are supposed to be made upon their credit.” This language varies somewhat from that found in the other cases, but in the light of the decisions it is clear that the expression “supposed to be made upon their credit” should be read as “presumed to be made upon their credit.”

Appellant has argued that the bank has never seriously contended that credit was extended upon the faith of the notes and drafts which had been deposited with the bank

for collection. It has not, of course, ever been suggested that immediate credit was given to the debtor upon the deposit of these items for collection and credit to the account. The stipulated facts show that the proceeds of the items were not credited to the account until they were actually collected. The point was made by appellee, however, that where there is a general course of dealing such as existed in this case, there is a presumption implied by law that the credit outstanding was extended in the first instance or suffered to remain unpaid upon the basis of the general course of dealing. The cases that have been referred to above amply demonstrate this principle.

In conclusion upon this point, it is therefore respectfully submitted that from the stipulated facts in the case there was an implied agreement that as part of the consideration for the extension of credit by the bank to the debtor a general course of dealing was contemplated and that the bank and the debtor both expected that this relationship would continue and that the debtor would deposit collection items with the bank for collection and credit to his account. If any consideration was required to establish the banker's lien under such circumstances, it is to be presumed as a matter of law from the conduct of the parties. There has been no evidence to rebut that presumption or to indicate that the parties intended something different. We therefore submit that this Court's conclusion upon this point in its prior decision was correct and amply supported by the authorities.

POINT II.

An Affirmance of the Judgment of the Court Below Will Not Extend the Banker's Lien but Will Apply Principles of the Law Merchant Which Have Been in Effect for Over 150 Years.

The second point urged by appellant in his petition for a rehearing is that the Court's former opinion extends the banker's lien beyond its rightful scope without legal or equitable justification.

The argument in support of this point may be briefly summarized somewhat as follows: The function of the banker's lien has not been broadened by statute; the cases referred to by appellant show there was no banker's lien because no credit was advanced; an agreement by a borrowing customer to use other services of a bank would include escrow, safe deposit and safekeeping services and the banker's lien was never used for this purpose; and the decision creates a new type of secret lien contrary to the intention of the Bankruptcy Act and therefore even if there were an agreement for a general course of dealing between the bank and the debtor there should be no banker's lien upon the collection items. If the bank did not discount the notes and drafts or accept them as a direct pledge, it is asserted that it could not be considered that the bank intended to rely upon them.

The assertions contained in the petition for rehearing extend far beyond those made in the appellant's briefs. The argument has been reduced to the direct statement that the banker's lien is limited to advances actually made upon the credit of the particular property involved. (Pet. p. 11.) This contention is the crux of the whole of appellant's case. *It is not supported by the authorities.* On the contrary, the true rule is that the banker's lien

attaches upon any property that comes into the hands of the bank in the course of its business as a banker to secure any past due indebtedness of the customer.

The basic principle of the law merchant establishing the banker's lien has always been subject to limitations expressed in the statement of the rule itself. Appellant has attempted to appropriate language of the Courts used in applying and interpreting such limitations to the facts of the present case in which they are clearly not applicable. This lack of understanding of the basic principle and its limitations has led to a misinterpretation of the decisions and to conclusions that are entirely unwarranted under the law.

(a) The Basic Doctrine of the Banker's Lien.

There is no clearer statement of the doctrine of the banker's lien than that contained in Section 3054 of the Civil Code of the State of California. It is evident that every word and every phrase of that section was carefully considered and that it embodies fully and completely the principle known to the law merchant with the limitations expressed in the decisions.

Appellant has argued that to understand the meaning of the language used in this section it is necessary to analyze and consider the cases referred to by the Code Commissioners of the State of California in drafting the section because our courts have held that codification of the rule has not extended its scope. Let us accept that premise.

The note of the Code Commissioners cited five cases.² From the manner in which the section is annotated, it would appear that the Commissioners referred to the case of *Davis v. Bowsher*, 5 T. R. 488, 101 English Reports 275, as *authority* for the basic principle embodied in the code section and referred to the other cases, not as *authority* for the principle, but by way of *explanation* of it. There is clearly a distinction between the citation of the first case followed by the statement “see *Brandao v. Barnett*, * * *

Davis v. Bowsher, *supra*, is not only the primary basis for Civil Code Section 3054, it is almost universally cited in the textbooks and decisions as authority for the banker's lien and as a statement of this basic principle of the law merchant. In view of the importance of this case let us consider it carefully.

Appellant correctly quotes the headnote as follows (App. Op. Br. p. 26):

“A customer lodges bills of exchange in the hands of his banker generally, and when the banker advances money to him, he applies it to the discount of such bills as happen to be nearest in value to the sum advanced. but without any special agreement to that effect. This does not invalidate the banker's general lien upon all the other bills in his hands. but he may retain them in order to secure the payment of his general balance.”

²“Note—*Davis v. Bowsher*, 5 T. R., p. 488; see *Brandao v. Barnett*, 3 C. B., p. 519; rev'g S. C., 6 M. & G., p. 630, and affirming S. C., 1 M. & G., p. 908; *Bank of Metropolis v. New England Bank*, 1 How. U. S., p. 234, 6 *Id.* p. 212; *Van Amee v. Bank of Troy*, 8 Barb., p. 312; 5 How. Pr., p. 161; *McBride v. Farmers' Bank*, 25 Barb., p. 657; 26 N. Y., p. 450.” (2 Civil Code of the State of California (1872), p. 315.)

The headnote is not sufficient to show the real facts and legal issues determined. The action was brought by the bankers upon a single bill of exchange which, with others, had been lodged in the hands of the bankers. *No credit had been advanced upon this bill*, nor upon some other bills lodged with the bankers. Previously other bills had been discounted and there was a general account due to the bankers. When an advance subsequently requested by the payee upon this bill was refused by the bank, the payee demanded a return of all the items not discounted, which the bank refused, alleging the right to retain all the bills. Subsequently the bank brought an action in assumpsit to recover from the drawer of the bill. Judgment for the plaintiff was affirmed on appeal.

It should be noted that the bill upon which suit was brought was one upon which *no credit had been advanced* when lodged with the bankers, although there was a general balance due to the bankers from prior transactions.

Lord Kenyon, Chief Justice, states the principles of the banker's lien as follows:

“I am clearly of the opinion that by the general law of the land a banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance, unless there be evidence to show that he received any particular security under special circumstances, which would take it out of the common rule. But it is taken for granted by the counsel in support of the rule, that the party had a right to demand of the bankers certain bills, which were not discounted, without paying their general balance; and the whole argument is built on that mistake. I think he had only a right to demand this bill *sub modo*, namely, on paying all that was

due to the bankers: *for wherever a banker has advanced money to another, he has a lien on all the paper securities which come into his hands for the amount of his general balance. . . .* It is very proper that there should be a known rule to govern the conduct of all persons of this description, whose dealings are very extensive; and that rule is, that no person can take any paper securities out of the hands of his banker, without paying him his general balance, unless such securities were delivered under a particular agreement, which enables him to do so."

This is the basic principle of the banker's lien as known to the law merchant. The bank has a lien on all property in its hands for the general balance due from a customer. There is no requirement here, nor in the Code section, that credit be advanced upon the particular item in order that the lien attach. No credit had been extended upon deposit of the item. The language of Chief Justice Kenyon is too clear to admit of doubt. He said *wherever* a banker has advanced credit to another, he has a lien on all the paper securities *which come* into his hands. In that case as in the instant case, the indebtedness was in existence at the time the paper came into the hands of the bank. No credit was extended upon receipt of the paper (although it was upon collection), but there as here the lien attached when the paper *came into the hands of the bank*.

Appellant's description of this case is that the Court held that the bank was entitled to hold the bills to protect itself since credit had been extended upon the whole account; that certain bills had been discounted merely for convenience, not for the purpose of signifying reliance upon them alone; and that manifestly the credit was extended upon the entire account. (App. Op. Br. p. 26,

Note 9.) We find nothing in the decision to warrant such conclusions. The indebtedness had been created *before* the bill in question had been lodged with the bank

The principle established by *Davis v. Bowsher*, namely, that a banker is entitled to a banker's lien upon collection items delivered to the bank without the extension of any credit upon them, has been consistently followed up to the present time. To demonstrate that this is true, we will refer the Court to some of the cases passing directly upon this point, in addition to the authorities cited in our previous brief.

Gibbons v. Hecox, 105 Mich. 509, 63 N. W. 519 (1895), was an action by the Receiver of the City National Bank of Greenville to establish a lien upon a promissory note for \$1,000 which was in the possession of the bank at the time of its failure. The facts showed that one Charles L. Hecox was indebted to the bank upon a promissory note for \$2,000, and that prior to the maturity of his indebtedness he deposited with the bank for collection a promissory note for \$1,000 signed by Sprague. After the failure of the bank and after the maturity of Hecox' note to the bank, Hecox assigned the Sprague note to Phelps. The action was dismissed upon demurrer in the Court below and reversed upon appeal. The Court said:

"The general rule derived from the cases is that the bank has a lien on all money, notes, and funds of a customer in its possession, for any indebtedness of a customer to the bank which is due and unpaid. The reason given for allowing the lien is that any credit which a bank gives by discounting notes or allowing an overdraft to be made is given on the faith that money or securities sufficient to pay the debt *will come into the possession of the bank in the*

due course of future transactions. In *Re Farnsworth*, 5 Biss. 223, Fed. Cas. No. 4,673, Judge Blodgett, of the United States circuit court of Illinois, held that a bank holding a customer's demand note has a lien upon the proceeds of drafts delivered to it for collection after the giving of the note, though collected after the filing of petition in bankruptcy, and can apply such proceeds upon the note."

Greene v. Jackson Bank et al., 18 R. I. 779, 30 Atl. 963 (1895), was an action by an assignee for the benefit of creditors to recover from the defendant bank the proceeds of a promissory note left with the bank for collection by the insolvent prior to the assignment. The Court said:

"The case shows that these notes on which the dividend accrued had been left, prior to the assignment, with the bank for collection in the usual course of business. This being so, the bank, according to the authorities, was entitled to a lien on Warner's half of the notes for the payment of any balance on general account which it might have against Warner, *the presumption being that its advances to him were made on the credit of such securities.* 1 Morse, Banks (3d Ed.) Sec. 324; *Lehman v. Manufacturing Co.*, 64 Ala. 567, 595; *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 71; *Ex parte Pease*, 1 Rose, 232; *Ex parte Wakefield Bank*, Id. 243, 19 Ves. 25."

It should be noted again that in this case there was no evidence of any consideration advanced to the insolvent upon the deposit of the promissory note with the bank for collection. On the contrary, the Court said that there was a presumption that the advances made to the insolvent by the bank were made on the credit of such securities.

In *Cockrill v. Joyce* (1896), 62 Ark. 216, 35 S. W. 221, McCarthy & Joyce Co. was indebted to the First National Bank for \$101,000. It deposited certain notes with the bank either for collection or as additional security. In an action to recover the notes by the assignee of McCarthy & Joyce, the trial court found that the notes had been deposited for collection and not as collateral security and gave judgment for the plaintiff. This judgment was reversed on appeal. The Court said:

“Under these circumstances, we conclude that the bank had a lien upon the notes for the payment of the amount due it by the company, without regard to the fact whether there was an express agreement for a lien or not. The law on this subject is well settled, and is thus stated by a recent writer: ‘A banker has a lien on all securities of his debtor in his hands for the general balance of his account, unless such a lien is inconsistent with the actual or presumed intention of the parties. The lien attaches to notes and bills and other business paper which the customer has intrusted to the bank for collection, as well as to his general deposit account . . . And so, if the securities be deposited after the credit was given, the banker has a lien for his general balance of account, unless there be an express contract, or circumstances that show an implied contract, inconsistent with such lien.’ 1 Jones, Liens (2d Ed.), Sec. 244.”

Here again the Court held the lien existed when the notes were deposited for collection and no credit was extended upon them, the indebtedness existing being a pre-existing debt.

There was a sequel to this litigation in the case of *Joyce v. Auten*, 179 U. S. 591, 45 L. Ed. 332 (1900). The

assignee of McCarthy & Joyce had sold the assets of the insolvent, including the notes in the possession of the First National Bank. The purchaser signed notes for the purchase price, with a surety. Upon failure to pay, the assignee sued the surety, which endeavored to defend upon the ground, among others, that the notes retained by the First National Bank were more than sufficient to pay the balance due and the assignee should collect from the bank. This was in effect again raising an issue as to the validity of the banker's lien on the notes. A demurrer to this defense was sustained. In affirming the judgment the Supreme Court of the United States said:

“The second defense is substantially that the bank was a creditor of the insolvent firm; that it was a preferred creditor; that it had certain notes for collection; that those notes were included in the sale, but were not turned over to the purchaser, and that they were of sufficient value to offset the amount due on this note. It is not alleged that the debt due from the insolvent to the bank had been paid by collection of those notes or otherwise, but the defense is rested on the averment that notes thus deposited and unpaid were of sufficient value to pay the unpaid purchase money. It is familiar law that a bank receiving notes for collection is entitled, in the absence of a contract, expressed or implied, to the contrary, to retain them as security for the debt of the party depositing the notes. 1 Jones, Liens, 2d ed. Sec. 244; *Bank of the Metropolis v. New England Bank*, 1 How. 234, 239, 11 L. Ed. 115, 116; *Reynes v. Dumont*, 130 U. S. 354, 391, 392, 32 L. Ed. 934, 944, 9 Sup. Ct. Rep. 486. But if such a banker's lien existed the sale transferred nothing but the equity in those notes after the payment of the debt secured by their deposit.”

The Supreme Court reached the same conclusion as to the validity of the banker's lien upon commercial paper deposited for collection as that made in *Cockrill v. Joyce*, *supra*.

In 1917 the Supreme Court of Vermont decided the case of *Goodwin v. Barre Savings Bank and Trust Co.*, 91 Vt. 228, 100 Atl. 34. This was an action by a trustee in bankruptcy to recover from the defendant bank the proceeds of certain contracts which had been left with the bank by the bankrupt for collection. *No credit was extended upon deposit of the items.* The facts therefore are parallel to the present case, that is, the trustee in bankruptcy was asserting that the bank had no right to a banker's lien upon paper in its possession for collection at the time of bankruptcy.

The plaintiff contended that three contracts which had been placed with the bank for collection were placed in the bank's hands for collection only and that therefore the bank was not entitled to assert a banker's lien. The bank asserted its right to hold the contracts under a banker's lien and also upon the contention that they had been orally assigned as additional security. The verdict of the jury was for the plaintiff and the bank appealed.

The trial court had charged the jury that if the contracts in question were delivered to the defendant for collection merely, the plaintiff was entitled to recover, and an exception was taken to this instruction. The Court on appeal sustained this exception and reversed the judgment of the court below upon the ground that when paper securities are deposited with a banker as security or for collection, *nothing more appearing*, they are subject to

the banker's lien for the general balance due to the bank, and in this connection the Court said:

"We think the contracts in question are 'paper securities' within the meaning of the rule. The theory of the law is that a bank extends credit and accommodations to its customer in reliance upon the expectation that such paper will, from time to time, come into its possession and become available to it as security or offset. So any business paper—paper that is or may be the basis of credit—is and logically should be subject to the lien. . . . When duly deposited with a banker as security or for collection, nothing more appearing, they are subject to his lien for the general balance due him. The exception is sustained."

Farr-Barnes Lumber Co. v. Town of St. George, 128 S. C. 67, 122 S. E. 24 (1924), was an action by the assignee of a promissory note executed by the defendant. The note had been assigned to the plaintiff by the Bank of St. George. The defense attempted to be set up was that the plaintiff was not a holder in due course, and this in turn was dependent upon the legal rights of the Bank of St. George in and to the note after its delivery by the original payee to the bank. The facts showed that one Traxler was indebted to the bank upon certain notes which had been discounted by the bank. The note in suit was delivered by him to the bank for collection. It was asserted by the bank that it was also an additional security for the indebtedness of Traxler to the bank. While the decision of the Court is based partly upon the assertion that the note was delivered to the bank as additional security, which, of course, would have been a specific pledge, the Court considered the rights of the parties also from the standpoint of a banker's lien against paper deposited

with the bank for collection and, in statement of the rule, quoted from 7 C. J. 613 as follows:

“Where one who deposits paper with a bank for collection is indebted to the bank, the bank has a lien on the paper and the proceeds thereof for the amount of such indebtedness.”

Another case in which a customer was indebted to the bank at the time of the deposit of the note for collection and no credit was extended is *Citizens Bank & Trust Co. v. Yantis* (Tex. Civ. App.), 287 S. W. 505 (1926). The Court said:

“We think it is clear from the authorities that, when a note or other security is placed in a bank by its customer for collection or for general account, in respect to mutual dealings as such, the bank has a lien upon a note or its proceeds to secure the payment of past-due indebtedness.”

The Court cited numerous cases in support of its conclusion, including *Bank of the Metropolis v. New England Bank, supra*, and *Joyce v. Auten*, 179 U. S. 591, 45 L. Ed. 332, and in explanation of the theory of the banker's lien stated:

“Since the lien is given upon the theory that any credit the bank extends to its customer by way of loan or overdraft is given on the faith that money or securities sufficient to meet the debt at its maturity will come into the possession of the bank to discharge the same, of course, in such a case no express agreement is necessary. If there be an express agreement, then such securities would stand as collateral, but, in the absence of an express agreement, as seen, the relationship and mutual dealings do necessarily raise the implication of an agreement that the customer intends for his indebtedness to be liquidated with the

fund deposited, and the commercial paper deposited is to be collected and credited to his general account.

"We know of no contrary holding by our Supreme Court to the effect that credit must be extended at time of deposit of paper, and not otherwise, and, even though that be the law, which we deny, then as a matter of fact the extensions were granted after the Cooper note was received, and while the proceeds were being collected and applied."

The most recent decision upon this exact point is *Wells Fargo Bank & Union Trust Co. v. McDuffie*, 71 F. 2d 720, (C. C. A. 9, 1934). The facts in that case were complicated, but a careful analysis of them will show that acceptances were deposited for *collection only* after an indebtedness was existing. This Court said:

"No credit had been extended on account of them, but the bank had a lien thereon for all sums due it . . ."

A comprehensive discussion of the entire subject of banker's liens is found in 1 Jones on Liens, Third Edition, page 250. The author there states, at page 253, in reference to the case of *Davis v. Bowsher*, *supra*:

"And so if the securities be deposited after the credit was given, the banker has a lien for his general balance of account, unless there be an express contract or circumstances that show an implied contract inconsistent with such lien."

See also for a general discussion the notes to *Garrison v. Union Trust Co.*, 139 Mich. 392, 102 N. W. 978 (1905), in 111 Am. St. Rep. 407-419.

We therefore have a continuous, unbroken line of cases from the Common Bench of England in 1794 to this Court in 1934, *all* to the effect that a banker's lien attaches to collection items deposited with a bank as security for indebtedness 'owing to the bank, *without any extension of credit* at the time of deposit of the items. Appellant has not cited *one case* to the contrary. It may be safely assumed that there *are* no cases to the contrary because this principle is the very essence of the doctrine of the banker's lien as it existed under the law merchant and as it exists today.

The limitations upon the basic principle of the banker's lien are likewise stated in Lord Kenyon's opinion in *Davis v. Bowsher*. He says that the lien applies unless the banker received a particular security under special circumstances which would take it out of the general rule. This limitation is more broadly stated by the Supreme Court of the United States in *Reynes v. Dumont*, 130 U. S. 354, 32 L. Ed. 934-944 (1889), where the Court quotes from Kent's Commentaries as follows:

" . . . yet a general lien does arise in favor of a bank or banker out of contract expressed, or implied from the usage of the business, in the absence of anything to show a contrary intention. It does not arise upon securities accidentally in the possession of the bank, or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien."

Let us consider some of the cases discussing these limitations.

(b) The Securities Must Come Into the Hands of the Banker in the Course of Business as a Banker.

Section 3054 of the Civil Code provides that the lien attaches to property of the customer coming into the hands of the banker "in the course of the business." This clause can only mean in the course of the *banking* business. As such it is expressive of a limitation upon the application of the banker's lien universally recognized by the decisions.

One of the earliest cases illustrative of this point is *Brandao v. Barnett* (1846), 3 C. B. 519, 136 English Reports 207, cited by the California Code Commissioners and relied upon by appellant. We think that appellant's assertion that the lien in that case was held not to arise when certain exchequer bills were placed in the hands of the bank *because* there had been no credit advanced upon them and no facts analogous to an implied pledge (App. Op. Br., p. 27) is clearly not justified by the decision. The case stands for no more than the qualification imposed upon every statement of the scope of the banker's lien, *i. e.*, the lien attaches unless the security was delivered under special circumstances indicating that the lien was not to attach.

In this case one Burn held exchequer bills belonging to Brandao. He kept them in a locked box *to which he held the key* at the banking house of the defendants. Whenever it became necessary to receive the interest on the exchequer bills or to exchange them for new ones, Burn took them out of the box and gave them to the bankers for that purpose. When the interest or new bills were received they were returned to Burn and locked up in the box by him. The bills were never entered in Burn's account, but the bank had no knowledge that they did not belong to him. In the latter part of 1836 Burn removed the bills from the

box and gave them to the bankers to secure new ones, but by reason of illness he did not pick them up from the bankers before he suspended in January, 1937, at which time he was considerably overdrawn at his bankers. Brandao, the owner of the exchequer bills, sued to recover them and the bankers claimed a banker's lien. The opinion of Lord Campbell said:

“Bankers most undoubtedly have a general lien on all securities deposited with them, *as bankers*, by a customer, unless there is an express contract, or circumstances that shew an implied contract, inconsistent with lien.”

He quoted from Lord Kenyon in *Davis v. Bowsher* (*supra*) to the effect that “Bankers have a general lien on all securities in their hands for their general balance, unless there be evidence to show that any particular security was received under special circumstances which would take it out of the common rule,” and then concluded that in the present case there was an implied agreement inconsistent with such claim of lien. He said:

“Your lordships will bear in your recollections that the exchequer bills for which this action is brought are the new exchequer bills, which the defendants obtained for the express and only purpose of being delivered by them to Burn, that he might deposit them in the tin box of which he kept the key. They not only were not entered in any account between Burn and the defendants but they were not to remain in the possession of the defendants; and the defendants, in respect of them, were employed merely to carry and hold them till the deposit in the tin box could be conveniently accomplished.”

It was clear that the Court considered that the exchequer bills were never delivered to the bankers in the ordinary course of the banking business. The Court said:

“Bankers have a lien on all securities deposited with them as bankers; but *these exchequer bills cannot be considered as deposited with the defendants as bankers.*

“During the argument in the Exchequer Chamber, it was very properly admitted by Sir Fitzroy Kelly (6 M. & G. 652, 7 Scott, N. R. 321) that ‘if bills of exchange were delivered to a banker merely for the purpose of being deposited in a box, there would be no lien.’ Does it signify whether the defendants were to deposit the securities in the box themselves, or were to deliver them for that purpose to Burn? I think, that under such circumstances, bankers acquire no lien, either upon the bills to be exchanged or upon the bills received in exchange.”

This case effectively disposes of the fears expressed in the Petition for Rehearing that the banker's lien might be asserted against property in safekeeping or in a safe deposit box or handled through an escrow. Such incidental services are not the business of banking and the banker's lien could not apply.³

A modern illustration of the principal of *Brandao v. Barnett* is the case of *Powell v. Bank of America*, 53 Cal. App. 2d 458, 128 P. 2d 123 (1942), in which the banker's lien was denied. The facts of that case show that in its essence the transaction was an escrow transaction and therefore not one in the course of the banking business.

³The acceptance of money or its equivalent in escrow is by statute not part of the banking business. Deering's General Laws, Act 652, §2.

Similarly in the case of *Della v. The Home Bank of Porterville*, 105 Cal. App. 106 (1930), the Court held that the money was received by the bank as a trustee for creditors and an offset or banker's lien would not apply.

(c) **The Securities Must Belong to the Customer.**

One element of the banker's lien expressed in the decisions and embodied in Section 3054 is that the securities upon which the lien is effective must belong to the customer.

It will be noted that in *Davis v. Bowsher*, Lord Kenyon referred to a lien upon securities *belonging* to any particular customer for *his* general balance. The Code section similarly provides for the lien upon property "belonging to a customer." This limitation was discussed in the other three cases cited by the Code Commissioners. The first of these was *Bank of the Metropolis v. New England Bank*, 1 How, 234, 11 L. Ed. 115; 6 How. 212, 12 L. Ed. 409.

In his opening brief, appellant relied strongly upon this case in support of his assertion that there could be no banker's lien unless there was an advance of credit upon the notes and drafts which were in the bank's possession. (App. Op. Br., pp. 28, 42.) In appellee's reply brief (p. 13) it was pointed out that this case and other cases referred to involved the question of a banker's lien upon collection items between corresponding banks, and that one principal reason for the absence of a banker's lien in those cases was that the forwarding bank held the item for collection merely and consequently had no title. In appellant's reply brief (p. 3) it is asserted that this contention is in error and that the Supreme Court of the United States in *Bank of Metropolis v. New England Bank* expressly refused so to hold. As this case is one of

cornerstones of appellant's contentions, we think that it should be considered more carefully.

There were three banks involved. The Bank of the Metropolis (Metropolis) located in the District of Columbia had a correspondent relationship with the Commonwealth Bank, Boston, Massachusetts (Commonwealth). The third bank was the New England Bank, Boston, Massachusetts (New England). New England, the plaintiff in the action, in the latter part of 1837 had deposited notes, drafts and other commercial paper with Commonwealth for collection. The paper fell due at various dates in the months of February to June, 1938, and was transmitted in the usual way to its correspondent, Metropolis, for collection.

On January 13, 1938, Commonwealth failed. *At that time* Metropolis held in its hands, for collection, the paper that belonged to New England but had been forwarded to it, properly indorsed, by Commonwealth. There was also an amount due from Commonwealth to Metropolis upon a current account between them. New England brought suit against Metropolis to recover the paper belonging to it.

The general course of dealing between the corresponding banks was stated by the Supreme Court as follows:

"It appears from the evidence offered by the plaintiff in error, that for several years prior to the insolvency of the Commonwealth Bank (which happened in January, 1838), there had been mutual and extensive dealings between the two last mentioned banks, and an account current between them, in which they mutually credited each other with the proceeds of all paper remitted for collection when received, and charged all costs of protest, postage, etc. Accounts were regularly transmitted from the one to the other,

and settled upon these principles; and upon the face of the paper transmitted, it always appeared to be the property of the respective banks, and to be remitted by each of them on its own account.

“The balances in the account current fluctuated according to the amount of paper they respectively transmitted, and these balances it would seem were generally suffered to remain until they were reduced by the proceeds of the notes and bills deposited with each other in the usual course of their business.”

We call the Court's attention to the manner in which credit was given—“they mutually credited each other with the proceeds of all paper remitted for collection *when received*.” It is difficult to distinguish that language from the stipulated fact here—“Claimant did, in the usual course of business, credit to the deposit account of the debtor, as and *when received*, the proceeds of all collection items” [R. 76]. It is clear that in each case the proceeds of the collections were *credited when received*. It should be noted further that the paper in issue all bore maturities later than the date of failure of Commonwealth, and therefore *no credit had been given by Metropolis*. The general course of dealing was *to give credit when the proceeds were received* exactly as the Bank gave credit to Salsbury when the items were collected.

At the trial the defendant Metropolis requested an instruction to the jury to the general effect that under the course of dealing described above, the defendant had the right to receive the paper *and the proceeds when recovered* until the balance of Commonwealth to Metropolis was paid. This instruction was refused and judgment rendered for New England.

From this statement of the facts, it is clear that the real issue in the case was the right of Metropolis to hold paper belonging to New England to secure a debt due from Commonwealth. But the Court considered first the legal principles applicable between the corresponding banks themselves. In that respect the facts were identical with the present case. Commonwealth (the debtor here) was indebted to Metropolis (appellee) for a general balance due. Commonwealth (the debtor) forwarded commercial paper to Metropolis (appellee) for collection and credit of the proceeds when received. Metropolis asserted the right to retain such paper against the general balance due from Commonwealth.

The Supreme Court said (1 How. [42 U. S.] 238-239):

“If the notes remitted had been the property of the Commonwealth Bank, there would be no doubt of the right to retain; because it has been long settled, that wherever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement.”

There is no statement here that the banker must have advanced credit on the particular securities upon which he claims a lien. The facts show the contrary. There was no money advanced or credit given to Commonwealth upon receipt of the collection item by Metropolis. Credit was given when the proceeds were collected, not before. Commonwealth was already indebted to Metropolis upon the open account. The question was whether Metropolis was entitled to hold the items so received against the general balance. The Court said that as between the banks *there*

would be no doubt of the right of Metropolis to retain the items.

The paper was not owned by Commonwealth but by New England, which was seeking its recovery. The Court said that possession of the paper by Commonwealth was *prima facie* evidence of its ownership, and that without notice to the contrary Metropolis was entitled to treat it as such. The Court did not say that an extension of credit upon the particular items was essential to the validity of the lien. It said that *if* an advance of money had been made to Commonwealth upon this paper, the right to retain for that amount *would hardly be disputed*, but that *without* any advance the lien would exist if a balance in the general account was predicated upon the mutual dealings. The Court's language is (1 How. [42 U. S.] 239) :

“* * * and if an advance of money had been made upon this paper to the Commonwealth Bank, the right to retain for that amount would hardly be disputed.

“We do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties.”

Upon the first appeal in this case, the judgment of the Court below was reversed because requested instructions upon this point had not been given to the jury.

The case was tried again and a second appeal taken to the Supreme Court (6 How. [47 U. S.] 212, 12 L. Ed. 409). The Court was of the opinion that the instructions

given to the jury on the second trial were not in conformity with the principles expressed in the Court's previous opinion and remanded the case for further trial. To assist the trial Court in submitting the matter to the jury, the Supreme Court itself stated the principles which should be embodied in the instructions to the jury in order to conform to the Court's prior opinion.

These principles were (6 How. [47 U. S.] 212, 12 L. Ed. 415):

1. If Metropolis had notice that Commonwealth was not the owner of the paper forwarded for collection it was not entitled to retain it as against New England.⁴

2. If Metropolis had no notice, but treated Commonwealth as the owner, it was nevertheless not entitled to retain the paper as against New England, the real owner, unless credit was given to Commonwealth or balance suffered to remain in its hands.

3. If Metropolis treated Commonwealth as the owner, without notice to the contrary, and upon the credit of remittances made or anticipated in the usual course of dealing suffered balances to remain in the hands of Commonwealth, it was entitled to retain the paper as against New England.

It is respectfully suggested that this case does not stand for the proposition urged by appellant that credit must be advanced upon the particular items before a banker's general lien can attach. On the contrary, in so far as it

⁴This is in keeping with the provision of Civil Code, Sec. 3054, which limits the right of the banker's lien to "*property belonging to a customer.*"

is a statement of the law merchant, it establishes two propositions:

First, as between a bank and its customer, the bank is entitled to retain an item delivered to the bank for collection, as against a general balance due, *without any extension of credit* upon the item. The Court says that whenever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance. It does not impose the qualification that credit must be advanced upon the particular item. The language of Section 3054 is practically identical. It says the banker has a general lien upon all property in his hands for the balance due in the course of business. Again there is no requirement that credit be extended upon the particular item upon which the lien is to attach.

Second, the bank is entitled to a general lien upon an item, *enforceable against the real owner*, if it has either (a) given credit to the forwarding bank or (b) suffered balances due from the forwarding bank to remain unpaid upon the expectation that future collection items will be transmitted.

Even if the present case were to be decided upon the basis of the second proposition of the *Metropolis* case, the applicability of the lien to property of *third persons*, the lien asserted by appellee would be valid because the evidence shows that appellee suffered balances to remain unpaid from Salsbury upon the expectation that future collection items would be deposited.

The cases of *Van Amee v. Bank of Troy* (1850), 8 Barb. 312, and *McBride v. Farmers Bank of Salem* (1857), 25 Barb. 657, both decisions of the Court of Ap-

peals of New York, which are relied upon by appellant (App. Op. Br. pp. 29, 30), were also cited by the California Code Commissioners.

In each of those cases, the issue involved was whether the banker's lien was enforceable against commercial paper deposited by the plaintiff in each action with Canal Bank for collection. The paper had been forwarded by Canal Bank to its correspondent for collection. At the time of failure of the Canal Bank it was indebted to each of the correspondent banks and they each sought to retain the paper under an asserted banker's lien. In each case, the lien was denied entirely upon the ground that the Canal Bank *was not the owner of the paper* and this fact was known or should have been known to its correspondent.

In each of the cases the New York Court referred to the holding of the United States Supreme Court in *Metropolis v. New England Bank* (*supra*) and particularly to that portion of the opinion which indicated that suffering balances to remain upon the expectation that future collection items would be forwarded was sufficient consideration to permit the banker's lien to attach *as against a third person* who owned the paper. In *Van Amee v. Bank of Troy* (*supra*) the Court said of its conclusion in this respect that "perhaps it would be different in cases coming before the Supreme Court of the United States." In the later case of *McBride v. Farmers Bank of Salem* (*supra*), the Court said bluntly of that portion of the decision, "in this we do not concur with that learned Court."

What is the effect of these decisions on the interpretation to be placed upon Section 3054? The cases stand for nothing more than that the banker's lien cannot apply to securities in the hands of a bank *which do not belong to its customer* against whom the lien is asserted. They differ

in the ultimate result from *Bank of Metropolis v. New England Bank* because they do not agree with the Supreme Court in its conclusion that the banker might retain even the property of a third person if he had no notice of that title and either extended credit or suffered balances to remain on the faith of future transactions in the course of business.

The principle of the *Metropolis* case was followed in *Garrison v. Union Trust Company*, 139 Mich. 392, 102 N. W. 978, 111 Am. St. Rep. 407 (1905). There the collecting bank credited the account of the forwarding bank upon the day the latter bank failed. When the receiver of the failed bank repaid all deposits made upon the day of failure, the collecting bank sued to recover the amount of the credit resulting from the collection, predicated upon its banker's lien upon the collection item. The Court allowed recovery. It is interesting to note that the Court pointed out that the doctrine of the *Metropolis* case had been adopted and applied in the federal Courts and in the states of Michigan, Colorado, Indiana, Missouri and West Virginia but had been repudiated in New York and some other states. The Court indicated that in its view, the doctrine of the Supreme Court in the *Metropolis* case "is the better one, both upon reason and authority."

In *Russell v. Haddock* (1846), 8 Ill. 232, one Gracie drew a bill on Russell payable to Smith & Co., N. Y., which was accepted by Russell. The bill was indorsed by Smith & Co. and sent to Newberry & Burch of Chicago for collection. Smith & Co. and Newberry & Burch were both bankers and brokers. The two firms were correspondents of and depositaries for each other; and when money was collected by one for the other, it was entered in the cash account as a credit. Before maturity of the bill,

Smith & Co. failed and Newberry & Burch sold the bill to Haddock, who brought action against the acceptor, Russell. Judgment for plaintiff.

The Court, by Caton J., said:

“I shall assume for the present that the case shows that the bill was in fact drawn merely for the purpose of collecting the amount of Russell, and that Smith & Co. *never paid Gracie anything for it*, and that *Newberry & Burch gave Smith & Co. nothing for it*. At the time of the failure of Smith & Co., the balance was against them and in favor of Newberry & Burch [for] more than the amount of this bill.”

The controlling issue in the case was whether Haddock was a *bona fide* purchaser of the bill as against Gracie, the drawer, who asserted ownership, and Russell, the acceptor. The Court concluded that he was. The Court said further:

“It seems to me, also, that this case is very analogous to, if not precisely identical with the case of *The Bank of the Metropolis v. The New England Bank*, 1 How. 234.”

After reviewing the facts and the Court's conclusion in the *Metropolis* case, the Justice made the statement appearing in this Court's former opinion and relied upon by appellant (App. Op. Br., p. 32), namely:

“Here, then, is the true principle upon which this, as well as all other banker's liens must be sustained, if at all. There must be a credit given upon the credit of the securities, either in possession or *in expectancy*.”

We need go no further than this decision to learn what the Court had in mind by the words “in expectancy” and

demonstrate that the decision conforms to the *Metropolis* case. Quoting further from the opinion:

“Counsel suppose they can see a difference between that case and this, because Willard, a clerk of Newberry & Burch, swore that they had kept funds in the hands of J. H. Smith & Co. to draw against. Whether funds were kept in their hands by remitting money directly, by accepting their drafts, or by transmitting paper for them to collect alone does not appear. It is most probable that it was done in the two latter modes at least, as is most usual with all bankers and brokers, nor does it seem to me to make any difference in principle. If they placed funds in the hands of Smith & Co. in either of these modes, it was upon the faith of the securities already on hand, *with the expectation that they would continue to remit paper for collection as formerly*, as well as upon the expectation that their draft would be honored.”

The Court upheld the banker's lien (by upholding the title of the purchaser from the bank) when no advance of credit had been made on the item to anyone involved. No advance was made to Gracie, the owner, when he deposited it with Smith & Co. for collection, and no credit was given to Smith & Co. when they deposited it with Newberry & Burch for collection. Nevertheless, Newberry & Burch gave a valid title when they sold the note under their general banker's lien.

As we pointed out in Appellee's Brief (p. 13) these cases involving the right to a banker's lien as against the property of *third persons* are not controlling upon the issues here because here the lien is asserted upon property *belonging to the bank's customer*. However, the *Metropolis* case affirms the principle of *Davis v. Bowsher* because it holds that between the bank and its customer, the banker's

lien attaches to paper deposited for collection and credit when the proceeds are received *without any immediate credit when the paper is deposited.*

(d) Property Pledged for a Specific Indebtedness Cannot Be Held Under a Banker's Lien for Other Indebtedness.

As we have previously pointed out, the basic principle of the banker's lien does not permit a general lien where the securities come into the hands of the banker under special circumstances which would take it out of the general rule. One of the instances of special circumstances preventing the application of the banker's lien to particular securities arises in the case in which property has been specifically pledged for a particular debt. The cases hold that in such circumstances the specific pledge prevents the banker from holding the property under a general banker's lien for other indebtedness.

One of the earliest American authorities upon this point is the case of *Reynes v. Dumont*, 130 U. S. 354, 32 L. Ed. 934 (1889). In that case the issue before the Supreme Court was whether certain bonds which had been placed in the custody of a bank in New York by a New Orleans bank could be held under a banker's lien to secure an indebtedness of the New Orleans bank. Both banks had failed. The bonds originally had been left for safekeeping. Later they were specifically pledged to secure the remittance of exchange created by drafts drawn against shipments purchased by the New Orleans bank to the extent of \$100,000. At the time of its failure, the New Orleans bank was not indebted for exchange purchased but was otherwise liable to the New York bank. The

question before the Court and the answer to it was stated by the Court as follows (32 L. Ed. 944):

“But if the bonds were liable by express contract for the obligations of the bank, could they also be made to respond to the indebtedness of Cavaroc & Son, in the absence of express agreement, by force of a lien implied from the usage of the business?

“In our judgment, the bonds, being in effect all pledged to guarantee the remittance by the bank of exchange purchased, could not be held by implication as security for the indebtedness of Cavaroc & Son on a balance of account. The specific pledge withdrew them from the operation of the alleged bankers’ lien, for it was inconsistent with the presumed intention of the parties.”

In support of its conclusion the Court referred to numerous cases (among them *Brandao v. Barnett*, 3 C. B. 518, 136 English Reports 207, relied upon by appellant), all to the general effect that a banker’s lien cannot attach for a balance due on a general account *where the property has been pledged for a specific obligation*. It quoted from its prior opinion in *National Bank v. Insurance Co.*, 104 U. S. 54, 71, to the effect that the banker’s lien attaches unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion.

Reynes v. Dumont has been followed in California. In *Bell v. Bank of California*, 153 Cal. 234, the California Supreme Court said that “where property is pledged to secure specific indebtedness, the pledgee has no right to hold it for any other obligation,” citing *Reynes v. Dumont*. The same ruling was made in *Berry v. Bank of Bakcrsfield*, 177 Cal. 206. In that case the Court cited *Bell v.*

Bank of California and, among other decisions, *Masonic Savings Bank v. Bangs, Adm.*, 84 Ky. 135, 4 Am. St. Rep. 197, which was one of the cases relied upon by the Court in *Reynes v. Dumont*.

This principle and the holdings in *Berry v. Bank of Bakersfield* and *Bell v. Bank of California* have been recognized by this Court. In *Wells Fargo Bank & Union Trust Co. v. McDuffie*, 71 F. 2d 720, 726, this Court said:

“But such an express agreement was necessary for under the law of California where specific property is pledged for a specific obligation to a bank, the bank has no general banker’s lien upon the proceeds of the pledged property. . . . *Arnold v. San Ramon Valley Bank*, 184 Cal. 632, 194 P. 1012, 13 A. L. R. 320; *Bell v. Bank of Cal.*, 153 Cal. 234, 94 P. 889; *Berry v. Bank of Bakersfield*, 177 Cal. 206, 170 P. 415; *Continental Nat’l Bk. v. Moore*, 299 F. 270 (C. C. A. 9).”

Another case which comes in this category is *In re Cummins Construction Corporation* (1947 D. C. Md.), 72 Fed. Supp. 409. This case is cited in Appellant’s Opening Brief (p. 39) as authority for the proposition that a bank does not have a lien where it has bare custody of the item. The facts were that the proceeds of certain government contracts had been assigned to the bank to secure loans in connection therewith. The loans were paid, but before the assignment was cancelled an additional government check was received by the bank and it attempted to apply the proceeds of the check to the payment of other indebtedness. The Court held that the attempted retention of the money constituted a preference because the debt for which the moneys were assigned had been paid. It would appear that the case was more one of offset than

banker's lien, but in any event the principle applied was that of *Reynes v. Dumont* (*supra*) that property pledged for a specific debt cannot be held for some other debt under a general banker's lien.

These cases have no bearing upon the issues here nor upon the proposition urged by appellant that immediate credit must be granted for the banker's lien to attach. They demonstrate the qualification imposed by the Supreme Court in *Bank of the Metropolis v. New England Bank* (*supra*) when it said the banker has a lien "unless such securities were delivered to him under a particular agreement." In the present case there was no pledge, and neither *Reynes v. Dumont* nor *Bell v. Bank of California* nor *Berry v. Bank of Bakersfield* is applicable.

(e) **There Is No Lien When Circumstances Indicate a Lien Was Not Intended.**

There are circumstances other than those which have been classified in the preceding subdivisions in which the courts have applied the limitation expressed in *Davis v. Bowsher* that the lien attaches "unless there be evidence to show that he received any particular security under special circumstances, which would take it out of the common rule."

The case of *Hanover National Bank v. Suddath* (1909), 215 U. S. 110, 54 L. Ed. 115, relied upon by appellant (App. Op. Br. p. 36) is an illustration of such circumstances. The American National Bank of Abilene, Texas, was indebted to the Hanover National Bank upon an open account. It sent a promissory note to the Hanover Bank with a letter stating it was sent for discount and credit, that is, the Hanover bank was to buy the note and give the Abilene bank credit for it. It was *not* sent for collec-

tion, as stated by appellant, but for discount. The Hanover bank, upon receiving the note, replied stating that it was not acceptable for discount but was being held as collateral for the indebtedness owing.

In an action by the receiver of the Abilene bank to recover the note, the Hanover bank claimed the right to hold it under its general banker's lien. Upon this point the Supreme Court said (215 U. S. 116, 54 L. Ed. 118):

“The rulings of this court foreclose this question, since they conclusively establish that a general lien in favor of a bank cannot attach to securities which are delivered to it in order that it may do a particular thing with them, and that, when it refuses to do that thing, the duty to return exists. The general subject was elaborately considered, and the authorities were fully reviewed, in *Reynes v. Dumont*, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep. 486.”

Here again, the absence of the banker's lien was not due to the fact that no credit had been extended. It was held that there was no lien because the lien was inconsistent with the intention of the parties. The note had been delivered for a particular purpose and could not be used for any other purpose.

The same situation existed in *Bank of Montreal v. White* (1880), 13 Otto [103 U. S.] 71; 26 L. Ed. 307,⁵ cited by the Court in *Hanover National Bank v. Suddath* (*supra*) and relied upon by appellant. The note was sent to the bank for *discount* and credit of the proceeds and not as a collection item in the usual course of business. The

⁵The case is erroneously cited in the *Hanover* case and in appellant's brief as 154 U. S. 660. The opinion appears as above cited.

bank declined to discount the note and the Court said there was nothing in the facts to indicate that if the bank declined to purchase the note it could keep it as collateral.

The case of *Biebinger v. Continental Bank* (1878), 99 U. S. 143, 25 L. Ed. 271, did not in fact involve a banker's lien at all, although it is sometimes cited to that effect. *The action was one to establish an equitable lien on real estate.* The Supreme Court said:

“There are no allegations in the bill which would bring the case within the principle of an *equitable mortgage* by deposit of title deeds. . . . There is no allegation of money loaned or debt created on the faith of the deposit of this deed.”

A banker's lien is in every case dependent on the banker's having the property in his hands. The bank did not have possession of the real estate. *It was not asserting a banker's lien on the deed.* It was seeking to establish an equitable lien on the real estate. Entirely different principles are applicable and the case cannot be considered as authority for the contention that credit must be extended upon a particular collection item before a banker's lien can attach.

A few other miscellaneous cases have been cited by appellant as purported authority for his basic contentions, and brief reference to them will be made.

Appellant states (App. Op. Br. p. 25): “The banker's lien apparently originated from the practice wherein banks discounted bills of exchange for merchants and thereby extended credit on the bills. Either the banks owned these bills or they were protected by a banker's lien for the advances made on the bills. Early English cases so indicate.” As authority for this proposition appellant cites

the cases of *Giles v. Perkins* (1807), 7 East 11, 103 Eng. Rep. 477, and *Thompson v. Giles* (1824), 2 B. & C. 422, 107 Eng. Rep. 441. In each of these cases bills not due had been deposited with bankers for collection, although credit apparently had been extended upon them. In each case the *banker* became bankrupt, and at the time of bankruptcy balances existed in *favor* of the plaintiffs. The issue in each case was whether the trustee in bankruptcy of the *bankers* could retain the bills upon the theory that they had been discounted. The Court in both cases held that the transactions did not amount to a discount and the trustees in bankruptcy were not entitled to retain the items. There was no question of a banker's lien because there was no indebtedness owing to the bank.

Cases concerned with the right of offset have likewise been cited in support of appellant's position. One such case was *Central National Bank v. Connecticut Mutual Life Insurance Co.* (sometimes cited as *National Bank v. Insurance Co.*), 104 U. S. 54, 71, 26 L. Ed. 693, 701 (1881). The real issue in that case was the right of the bank to exercise an offset against a deposit account. The Court ruled that the deposits were trust funds and that the bank knew or should have known that fact. It denied the right of offset. There is no indication from reports of the case that a banker's lien was asserted and the Court's language with respect to it was by way of explanation of the asserted right of offset.

In *Niblack v. Park National Bank* (1897), 169 Ill. 517, the question involved was that of the right to offset a deposit account against a note held by the bank. Under

the law of Illinois at the time, a check drawn upon a bank operated as an assignment of the funds on deposit. After a check had been presented, the bank attempted to exercise an offset. The Court held that a banker's lien could not apply to funds on deposit, and its reference to the nature of a banker's lien by a quotation from the case of *Fourth National Bank v. National City Bank*, 68 Ill. 398, which in turn quoted from *Russell v. Haddock* (*supra*), was only by way of illustration. *Moore v. Third National Bank* (1910), 41 Pa. Sup. Ct. 497, was likewise concerned only with the right of offset. Checks deposited upon the day of filing the bankruptcy petition could not be offset against an indebtedness of the bankrupt.

Appellant has asserted that the statement of the nature and scope of the banker's lien made by the California Supreme Court in *Gonsalves v. Bank of America* (1940), 16 Cal. 2d 169, was merely "a statement introductory to an explanation of the right of set-off." (App. Op. Br. p. 23.) That, of course, is correct. Nevertheless, *it is the considered expression of the Supreme Court of this state*. It is of far greater value in determining the law of this state today than a similar explanation by the courts of another jurisdiction.

Anglo-California Bank v. Grangers Bank (1883), 63 Cal. 359, has no relation whatever to the facts here. The Court said there could be no banker's lien because the bank did not have possession of the shares of stock, but there were other obvious reasons why the assertion of a banker's lien was entirely without merit.

Summary.

The basic principle of the banker's lien, as stated in Section 3054 and exemplified by the decisions, is that wherever an individual is indebted to a bank, the bank has a lien upon all property which comes into its hands for the general balance due, unless the property comes into the bank's hands under special circumstances which would take it out of the general rule.

Special circumstances sufficient to take a case out of the general rule have been shown by the decisions to be in the following categories:

(i) Where the property does not come into the hands of the bank *as a banker*, thus the lien does not attach when the property is received for safekeeping, safe deposit, in escrow or trust;

(ii) Where the property does not belong to the customer, although here the lien will attach if the bank has extended credit upon it or suffered balances to remain unpaid upon the faith of a course of dealing;

(iii) Where the property is pledged for a specific debt it cannot be held for some other debt; and

(iv) Where the circumstances indicate the application of a lien would be contrary to the intention of the parties.

The handling of commercial paper, notes, drafts, acceptances, checks and similar instruments, whether by way of discount or for collection, has been historically the function of bankers. Commercial paper coming into the hands of a bank in the course of the banking business is subject to the banker's lien for a balance due on account, in the absence of such special circumstances, whether or not any credit has been extended upon it at the time it was deposited with the bank.

It is true that the banker's lien is an implied pledge—it is a pledge implied by law without the express contract of the parties. Appellant's argument is that if the bank intends to rely upon notes and drafts deposited with it for collection as collateral or security for an indebtedness, it should be so stated in the loan agreement and such items pledged with the bank. Such an argument, of course, ignores the existence of the statute. As we have seen, there can be no general banker's lien when specific property is pledged. Appellant is in effect arguing that there can be no lien unless it is pledged. The result would be to exclude the statute from any effectiveness whatever.

It is respectfully submitted that under the facts of this case appellee was entitled to a banker's lien upon the notes and drafts deposited with it for collection and in its hands at the time of filing the debtor's petition whether or not any credit was advanced to the debtor upon the deposit of such items.

It is respectfully suggested that this Court's prior opinion impliedly limits the right to a banker's lien to instances where the bank has extended credit or suffered balances to remain unpaid in reliance upon a course of dealing. Such an implication, we believe, arises from the fact that the Court refers to the Receiver's contention that the banker's lien does not attach to commercial paper delivered for collection unless and until the bank extends credit thereon, and this is followed by the Court's statement that there is no problem here as to whether the lien is impressed upon securities delivered to a bank under an instruction to collect and deposit the proceeds to the deliverer's account, without more, and that the Court, under these limited circumstances, need not decide whether the California statute would impose the lien.

Such an implication casts doubt upon the meaning of the California statute which, it is respectfully suggested, is not justified either by the language of the statute, the decisions of the California courts interpreting it, or the historic rule of the law merchant. The cases which have heretofore been cited in this brief show that wherever there is an indebtedness owing to a bank, the bank has a lien upon securities thereafter coming into its hands until the indebtedness is paid. The rule contains no requirement that new or additional consideration pass to the customer before such a lien attaches. Any decision of this Court casting a doubt upon such a firmly established principle would lead to endless litigation by bankruptcy trustees seeking to recover assets for bankrupt estates upon asserted causes of action which are clearly unjustified by the historic role of the banker's lien.

Upon the facts of this particular case, the evidence shows that there was a course of dealing between the parties under which the bank extended credit and suffered balances to remain outstanding in expectation that the banking business of the debtor, including specifically the deposit and collection of commercial paper, would be handled with the bank. If any consideration were required upon the deposit of the items in order for the banker's lien to attach, we have shown that under the authorities a suffering of balances to remain unpaid is sufficient to authorize the banker's lien to be asserted as against the property of third persons. As between the bank and its customer, however, the authorities show that no credit need be advanced to the customer at the time the property comes into the hands of the bank. It is respectfully suggested, therefore, that the implication contained in this Court's prior opinion will limit the scope of the banker's lien in a manner not justified by the decisions and the provisions of the statute.

POINT III.

Statutory Lien Is Not a Preference.

A considerable portion of the argument in the Petition for Rehearing is devoted to the assertion of the grave injury that will result to non-bank creditors of a debtor or bankrupt by permitting banks to exercise a banker's lien upon commercial paper that has been deposited for collection without an advance of funds to the bank's customer. It is asserted that creditors are generally mindful of the fact that deposits with a bank are subject to the right of set-off in the event of bankruptcy, but that no creditor would believe that notes and drafts in the hands of the bank for collection would be subject to a banker's lien. Appellant asserts further that under the Court's opinion the Court has permitted a new type of secret lien contrary to the express intention of the Bankruptcy Act.

The argument that the exercise of a banker's lien upon collection items creates a secret lien contrary to the intention of the Bankruptcy Act and contrary to the decisions of the Supreme Court of the United States is entirely unwarranted and unsupported by authority.

The banker's lien in this state, at least, is a statutory lien derived from Section 3054 of the Civil Code of the State of California. The Bankruptcy Act by its terms provides that liens provided for by statute in favor of various classes of persons created or recognized by the laws of any state are valid against the trustee even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the bankruptcy pro-

ceedings.⁶ While the statute refers specifically to statutory liens in favor of employees, contractors, mechanics and landlords, it also refers to "other classes of persons," and clearly the statutory banker's lien provided for by the Civil Code brings bankers within the other classes of persons referred to by the section.

The argument that a lien authorized and provided for by statute is a secret lien is not sound. The statute providing for such a lien can only be enacted by the State Legislature and the public is presumed to know its provisions. The editorial comment of the authors of *Collier on Bankruptcy* (14th Ed.), Vol. 4, page 161, is instructive on this point. The authors say:

"Some recognition of statutory liens in bankruptcy cannot on general principles be open to serious objection. The existence of such protective legislation on the statute books in any particular state is an unequivocal expression of the lawmakers' collective

⁶Section 67b of the Bankruptcy Act (11 U. S. C. 107b) provides as follows:

"The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court."

judgment that the particular class of persons or the sovereign has a special interest in and claim upon the property of the debtor which deserves special treatment. Moreover the universality of many types of statutory liens is persuasive that unsecured creditors are not unduly prejudiced or unjustly treated when their rights in bankruptcy are subordinated to such liens."

In the case of *Henderson v. Mayer*, 225 U. S. 631, 637, 56 L. Ed. 1233, 1235 (1912), the Supreme Court was discussing the validity of a levy of distress for unpaid rent as against the rights of the trustee in bankruptcy of the tenant. The Court, speaking through Mr. Justice Lamar, said:

"The provisions of the bankruptcy act, preventing an insolvent from giving or the creditor from securing preferences for pre-existing debts, apply not only to mortgages and transfers voluntarily made by the debtor, but also to those preferences which are obtained through legal proceedings, whether the lien dates from the entry of the judgment, from the attachment before judgment, or, as in some states, from the levy of execution after judgment. But the statute was not intended to lessen rights which already existed, nor to defeat those inchoate liens given by statute, of which all creditors were bound to take notice, and subject to which they are presumed to have contracted when they dealt with the insolvent."

The language of the District Judge for the Northern District of New York in *In re Caswell Construction Co., Inc*, 13 F. 2d 667 (1926), is also enlightening upon this point. In considering whether or not a mechanic's lien as created by the laws of New York was within Section

67d of the Bankruptcy Act as it existed at that time, the Judge said:

“Statutory liens and common-law liens, like those of lodging house keepers, are neither ‘given’ nor ‘accepted’ in good faith or otherwise. The only liens that can be given or accepted in good faith would seem to be voluntary liens. Statutory and common-law liens are not voluntary liens, but are exactly the opposite, namely, involuntary liens. They arise by operation of law, with or without some affirmative action on the part of the lienors, and without any participation on the part of the owner of the property. They are not given voluntarily, but they are imposed involuntarily upon the property of the owner, who may be called a lienee. There is authority for holding that statutory liens do not come under and are not included within the provisions of section 67d. *In re Cramond* (D. C.), 145 F. 966-976.”

These cases were decided under the 1910 Amendment to the Bankruptcy Act of 1898, and under that statute there was considerable uncertainty as to whether statutory liens were valid as against a trustee in bankruptcy. The 1938 amendments to the Bankruptcy Act, however, removed any doubt upon this score. Section 67b provides specifically that liens created by statute shall be valid against a trustee in bankruptcy notwithstanding the provisions of Section 60a (see *Davis v. City of New York*, 119 F. 2d 559 (C. C. A. 2, 1941); *Commercial Credit Co., Inc. v. Davidson*, 112 F. 2d 54 (C. C. A. 5, 1940).) It is respectfully submitted that there is no merit to the argument that the banker’s lien provided for by Section 3054 of the Civil Code, creates a preference or a secret lien contrary to the intention of the Bankruptcy Act.

Conclusion.

For the reasons and upon the authorities hereinabove set forth, it is respectfully submitted that this Court should determine that appellee was entitled to assert its banker's lien upon the collection items in its hands at the time of the filing of the debtor's petition and that the judgment of the Referee and the District Court should be affirmed.

Respectfully submitted,

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No. 12208

United States
Court of Appeals
for the Ninth Circuit

WALTER J. POPOVICH,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED

APR 29 1949

PAUL P. O'BRIEN,

CLERK

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for
the Northern District of California, Southern
Division

No. 27710-H

WALTER J. POPOVICH,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR DAMAGES

Plaintiff complains of defendant and for cause of
action alleges:

I.

That at all times herein mentioned defendant
United States of America was engaged in the conduct
of an interstate railroad known as Alaska Railroad
doing business in the Territory of Alaska and certain
states of the United States through its connection
with other interstate carriers in the United States.

II.

That the injuries to plaintiff hereinafter com-
plained of arose while plaintiff was an employee of
said United States of America acting in the regular
course and scope of his duties as an employee of said
Alaska Railroad engaged in the conduct of interstate
commerce on behalf of the said United States.

III.

That this action is brought under and by virtue
of the provisions of the Federal Employers' Liability
Act, 45 U.S.C.A. 51, et seq., and the Federal Safety
Appliance Act, 45 U.S.C.A. 2, et seq.

IV.

That on or about the 26th day of August, 1946, at or about the hour of 8:00 o'clock a.m. thereof, plaintiff was employed by defendant as a brakeman working on one of defendant's freight trains which was engaged in performing certain switching movements in defendant's railroad yard in the City of Fairbanks, Territory of Alaska.

V.

That at said time and place acting in the regular course and scope of his duties plaintiff was required to and he was engaged in assisting other members of his crew in attempting to couple said train on to a certain cut of three hopper cars; that at said time and place the coupling apparatus of one or both of the two freight cars which were to be coupled together were defective and inefficient in that when the cars were brought together in the regular manner the coupling pin failed to drop; that as a direct and proximate result of said defective and inefficient condition plaintiff then stepped to one of said cars in order to release the lock block; that as a further and proximate result of said defective and inefficient condition and as plaintiff was working with the lock block on one of said cars the three hopper cars were caused to suddenly roll back and catch plaintiff's right arm between the two couplers thereby causing plaintiff to sustain the injuries hereinafter enumerated.

VI.

That at said time and place the couplers between said cars were inefficient in violation of the Federal Safety Appliance Act, 45 U.S.C.A., Section 2.

VII.

That by reason of the facts hereinabove set forth and as a direct and proximate result of the failure of defendant to have said couplers in proper repair as hereinabove alleged, plaintiff was rendered sick, sore, lame, disabled and disordered, both internally and externally, and received the following injuries, to wit: multiple comminuted compound fractures of the right forearm with resultant deformity of said arm, extreme pain and suffering and a severe shock to his nervous system.

VIII.

That at the time of the happening of the accident, plaintiff was a strong and able bodied man capable of earning and earning the sum of approximately \$300.00 per month; that by reason of the facts hereinabove alleged and the injuries proximately caused plaintiff thereby, plaintiff is now, and will be for an indefinite period of time in the future rendered incapable of performing his usual work or services or any work or services whatsoever, all to plaintiff's damage in an amount as yet unascertainable, and that when said sum is ascertained, plaintiff will pray leave of court to insert said sum as the reasonable value of said loss of services.

IX.

That by reason of the facts hereinabove set forth and as a direct and proximate result thereof as aforesaid, plaintiff has been generally damaged in the sum of \$100,000.00.

Wherefore, plaintiff prays judgment against de-

fendant in the sum of \$100,000.00, together with such special damages as may be hereafter ascertained, and for his costs of suit incurred herein.

HILDEBRAND, BILLS &
McLEOD,

By /s/ C. C. McLEOD,
Attorneys for Plaintiff.

State of California,
County of Alameda—ss.

Charles C. McLeod, being first duly sworn, deposes and says: that he is one of the attorneys for plaintiff in the above entitled action; that he has read the foregoing complaint for damages and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters that he believes it to be true; that plaintiff is absent from the County of Alameda wherein affiant maintains his offices and that affiant therefore makes this verification on behalf of plaintiff.

/s/ CHARLES C. McLEOD.

Subscribed and sworn to before me this 1st day of October, 1947.

(Seal) /s/ DORIS ANDERSON,
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed Oct. 22, 1947.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendant United States of America and moves to dismiss the complaint on file herein on the following grounds:

I.

The complaint does not state facts sufficient to constitute a claim against defendant.

II.

The complaint does not state a claim within the jurisdiction of this Court.

III.

It appears from the face of the complaint that the alleged cause of action arose not later than August 26, 1946, and that the complaint was filed on October 22, 1947, more than one year subsequent to the date said alleged cause of action accrued. It is therefore barred by the provisions of Title 28 U.S.C., Sec. 2401, Federal Torts Claims Act, Section 420.

Wherefore defendant prays that the complaint be dismissed.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant.

NOTICE OF MOTION

To the plaintiff above named and to Messrs. Hildebrand, Bills and McLeod, Attorneys at Law, 1212 Broadway, Oakland 12, California, his attorneys:

Please Take Notice that the undersigned will bring the attached Motion to Dismiss on for hearing before this Court at Room 276, Post Office and Court House Building, City and County of San Francisco, California, on the 25th day of October, 1948, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 8, 1948.

[Title of District Court and Cause.]

DEFENDANT'S POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS
COMPLAINT

The alleged cause of action is against the United States of America. The statutory action of Congress waiving sovereign immunity upon which the jurisdiction of the Court must be based is the Federal Torts Claims Act of 1946, Public Law 601, now

incorporated into Title 28 U.S.C., Sections 1346, 1402 (b), 2401, 2402, 2671 to 2680, and other Sections.

Under Sec. 410(a) of the Federal Torts Claims Act (Title 28 U.S.C., Section 1346, 1402(b) and 2402), the United States District Court for the District wherein plaintiff is resident or wherein the act or omission complained of occurred, including the United States District Court for the Territories and possessions of the United States, has exclusive jurisdiction of plaintiff's claim.

I.

The complaint alleges the Territory of Alaska as the place where the act or omission occurred but contains no allegation as to the residence of the plaintiff.

II.

It appears from the face of the complaint that it was not filed within one year subsequent to August 26, 1946, the time the alleged cause of action arose, and it is therefore barred by Sec. 420 of The Federal Torts Claims Act, 28 U.S.C. 2401.

III.

There can be no question that the jurisdiction of the Court can only be invoked under The Federal Torts Claims Act, Sec. 423, 28 U.S.C. 2679. "The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under Section 1346(b) of this title, and

the remedies provided by this title in such cases shall be exclusive.”

It is respectfully submitted that defendant’s motion should be granted without leave to plaintiff to amend.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 8, 1948.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS

Defendant’s motion is made upon the ground that more than a year elapsed following the accident until the complaint was filed. The motion assumes that the action is brought under the Federal Tort Claims Act. The complaint specifically states that the action was brought under the Federal Employers’ Liability Act and accordingly as this action is brought under said Act the applicable limitation was, of course, the period of three years from the date of the accident. The important question before the Court is as to whether the United States of America after entering into the business of a common carrier by rail is subject to the terms and provisions of the Federal Employers’ Liability Act.

So far as we have been able to ascertain this precise question has never been determined by any of the Federal Courts of the United States. We do believe, however, that certain decisions by such courts make it plain that the United States should be held to come within the terms of such Act and accordingly we wish to call the court's attention to the following decisions and facts:

In the case of the *United States v. California*, 297 U.S. 175, an action arose out of the attempt of the United States to collect a penalty from the State of California for failure to comply with the terms of the Safety Appliance Act. The subject matter of that action was concerned with the operation by the State of California of the State Belt Line Railroad at San Francisco. The Supreme Court held that the State of California by engaging in such business had subjected itself to all of the provisions regulating other common carriers by rail. The opinion was given by Justice Stone and in part he said:

"The state urges that it is not subject to the Federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of the operation for harbor improvement, . . . it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal act.

“In any case it is argued that the statute is not to be construed as applying to the state acting in that capacity.

“Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its ‘sovereign’ or in its ‘private’ capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the state is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interstate commerce. . . . A contract between a state and a rail carrier fixing intrastate rates is subject to regulation and control by Congress, acting within the commerce clause, . . . as are state agencies created to effect a public purpose. . . . In each case the power of the state is subordinate to the constitutional exercise of the granted federal power.

“The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on

taxation by either of the instrumentalities of the other.”

“But there is no such limitation upon the plenary power to regulate commerce.”

“California, by engaging in interstate commerce by rail has subjected itself to the commerce power and is liable for a violation of the Safety Appliance Act, as are other carriers, unless the statute is to be deemed inapplicable to state-owned railroads because it does not specifically mention them. The Federal Safety Appliance Act is remedial, to protect employees and the public from injury because of defective railway appliances, . . . and to safeguard interstate commerce itself from obstruction and injury due to defective appliances upon locomotives and cars used on the highways of interstate commerce, even though their individual use is wholly intrastate. . . . The danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned. No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive this protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute, or why its all-embracing language should not be deemed to afford that protection.

“In *Ohio vs. Helvering*, . . . it was held that a state, upon engaging in the business, became subject to a federal statute imposing a tax on those dealing in intoxicating liquors, although states were not specifically mentioned in the statute. The same conclusion was reached in *South Carolina vs. United States*,

. . . Similarly the Interstate Commerce Commission has regarded this and other state-owned interstate rail carriers as subject to its jurisdiction, although the Interstate Commerce Act does not in terms apply to state-owned rail carriers * * *

“Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, . . . This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. . . . The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. . . . We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial.”

Following the decision by the United States Supreme Court in the case of *Maurice v. State of Cali-*

43 C.A. (2) 270

~~fornia, an injured employee of the State Belt Rail-~~

Appellate

~~road,~~ the Supreme Court of California held that the Federal Employers' Liability Act gave relief to an employee of a State railroad and the action between

the employee and employer was said to be in no way different from the remedy afforded to the employee of a private carrier. It is clear, therefore, that the courts of this land have unequivocally held that at least a state government is subject to the terms of the Federal Employers' Liability Act even though the Act itself in no way specifically mentions that such state should be held subject to such Act. It is further clear from the opinion of the United States Supreme Court that the reasoning followed in so holding was based largely on the fundamental principle that the operation of any railroad is so fraught with dangers to the public and to the employees of such railroad that under the broad commerce power given to the Congress by our Constitution there should be no distinction between government-owned and privately-owned railroads.

We recognize the fundamental rule that no suit may be brought against a sovereign unless the sovereign itself has authorized such suit. We believe that the United States has authorized such suit by giving to the Congress its broad powers over commerce and by the action of Congress in passing the Federal Employers' Liability Act. We fail to see any distinction in this reasoning as opposed to the reasoning by the Supreme Court in holding that the State of California was subject to the terms of the Act. We further earnestly wish to call to the Court's attention the fact that the United States Government acting for its agency the Alaska Railway has recently subjected itself to the terms of the Railway Labor Act by entering into a contract with the Brotherhood of

Railroad Trainmen providing for exact compliance with such Act.

As to any question as to the jurisdiction of this Court in California to try a Federal Employers' Liability Act suit arising out of an accident in Alaska, we wish to call the Court's attention to the case of *Panama R. Co. v. Johnson*, 264 U.S. 375 at page 384, where the court held that the purpose of the Seaman's Act and the Suits in Admiralty Act was to give seamen relief against the United States in its own courts, regardless of where the action was brought. The decision states:

"The concepts of residence and principal place of business obviously can have no relevance when applied to the United States. It is ubiquitous throughout the land and unlike private parties is not centered in one particular place. The residence or principal place of business of the libelant and the place where the vessel or cargo is found may be the best measure of the convenience of the parties. But if the United States is willing to defend in a different place, we find nothing in the Act to prevent it."

It would seem that a complainant under the Railroad Act would be entitled to even more consideration in determining the proper place of suit inasmuch as Section 56 of said Act holds that the suit may be brought at any place where the employer is engaged in business, whereas, under the Seaman's Act the place of suit is specifically limited to the place of residence of the ship owner or to the place where the vessel could be found. In this action the plaintiff is a resident of the State of California; the government is certainly present in this state and as far as

the equities of the matter are concerned the terrible injuries suffered by plaintiff make it important that he not be required to make the arduous journey to Alaska in order to prosecute his rights.

We respectfully submit that the Motion of defendant should be denied and that defendant be required to make its answer accordingly.

HILDEBRAND, BILLS &
McLEOD,

By /s/ SHERIDAN DOWNEY, JR.,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 6, 1948.

[Title of District Court and Cause.]

DEFENDANT'S REPLY MEMORANDUM ON
MOTION TO DISMISS

Plaintiff in his complaint has sought to invoke the jurisdiction of this Court in the above action against the United States under the Federal Employers Liability Act.

Defendant has not consented to be sued under the Federal Employers Liability Act. Plaintiff can cite no authority for such consent.

Congress has the right to prescribe the terms and conditions upon which the United States of America must be sued.

U. S. v. Sherwood, 312 U. S. 584.

Minnesota v. U. S., 305 U. S. 382.

U. S. v. Fidelity, 309 U. S. 506.

Suit may not be maintained against the United States if not clearly within the statute giving consent and the right to sue the United States is strictly construed.

U. S. v. Sherwood, 312 U. S. 584.

The sovereignty of the United States raises a presumption against its suability unless it is clearly shown, nor should a Court enlarge its liability to suit conferred beyond what the statute requires.

Eastern Transport Co. v. U. S., 272 U. S. 675.

If Congress in certain cases gives its consent the Courts are confined to the letter of the statute which expresses such consent.

Schillinger v. U. S., 155 U. S. 163, 166.

All provisions of such a statute are jurisdictional as the liability and the remedy are created by statute. The limitations of the remedy are regarded as limitations of the right.

The Harrisburg, 119 U. S. 199, 214.

The Insonomia, (C.C.A. 2), 285 Fed. 516, 520.

Congress has given consent for suit against the United States by enacting the Federal Tort Claims Act, and the Court clearly has jurisdiction of the instant case under the Federal Tort Claims Act.

The Court's attention is called to the argument similar to that of plaintiff in the present case, made in the case of *Crescitelli v. U. S.*, 66 F. Supp., 894, aff. 159 F. (2d) 377:

“The libelant argues that he has certain substantive rights under the Jones Act, one of which is the right to commence a suit to recover for his son's death at any time within three years, and that, inasmuch as the Clarification Act gave his son ‘all rights * * * under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels’, his right of action thereby acquired the three year limitation period of the Jones Act.”

The Court granted a Motion to Dismiss on the ground that the action was not filed within two years as required by the Suits in Admiralty Act. In doing so, the following language from decision in *The Insonomia*, 285 Fed. 516, 520 was adopted:

“In interpreting the Act” (Suits in Admiralty Act), “permitting as it does suit to be brought

against the United States, we must follow the rule of strict construction. This follows from the fact that the United States can not be sued without their consent, and if Congress in certain cases gives its consent, the Courts are confined to the letter of the statute which expresses such consent * * *. And all the provisions of such a statute are jurisdictional. As the liability and the remedy are created by the statute, the limitations of the remedy are regarded as limitations of the right.”

See also *Kakara v. U. S.*, 157 F. (2d) 578 (C.C.A. 9th).

It is respectfully submitted that plaintiff must invoke the jurisdiction of this Court under the Federal Tort Claims Act, and not having filed suit within one year as required by said Act, his claim is barred.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ C. ELMER COLLETT,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 13, 1948.

District Court of the United States, Northern
District of California, Southern Division

At A Stated Term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Thursday, the 23rd

day of December, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Dal M. Lemmon, District Judge.

[Title of Cause.]

ORDER GRANTING MOTION TO DISMISS

The motion to dismiss heretofore having been heard, being now submitted and duly considered, it is Ordered, in accordance with an opinion and order this day signed and filed, that said motion be and the same is hereby granted.

In the United States District Court for the Northern
District of California, Southern Division

No. 27710-H

WALTER J. POPOVICH,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

In this action plaintiff seeks to recover damages from the defendant, United States, for injuries alleged to have been sustained by him August 26, 1946, in an accident occurring on the Alaska Railroad while employed by defendant, the accident occurring through and as the proximate result of negligence of employees of the defendant, defendant and plaintiff

at the time both being engaged in the conduct of interstate commerce.

This action was commenced on October 22, 1947. Defendant moves to dismiss upon the ground that the action was not begun within one year after the injury was inflicted. It must be conceded upon this motion that if the cause depends solely upon the provisions of the Federal Tort Claims Statute the cause was not seasonably begun and the motion should be granted. Title 28 U.S.C. Sec. 2401. Plaintiff counters with the claim that his cause of action is under the Federal Employers' Liability Act, 45 U.S.C.A. Sec. 51 et seq., rather than under the Federal Tort Claims Statute; that the limitation is therefore three years. 45 U.S. C.A. Sec. 56.

Plaintiff's position appears to be that the Federal Employers' Liability Act applies to all carriers engaged in interstate commerce by rail, and that the defendant United States having engaged in such commerce thereby subjected itself to the liabilities of that statute.

Plaintiff leans heavily upon the case of *United States v. California*, 297 U.S. 175. The State of California owns and operates a railroad along the water front in the City of San Francisco. The United States brought the action to recover a statutory penalty for violation of the Federal Safety Appliance Act. The defendant claimed constitutional immunity. That case is foreign to the question here presented. The commerce provision in the United States Constitution is both a grant and a surrender of power over the field which it covers. The authority of the federal

government therein is exclusive. The sovereign authority of the state has been surrendered to the extent the grant operates. The state is subject to all of the acts of Congress which come into being in the exercise of that power. The case of *United States v. California* is clearly and expressly bottomed upon this. It is stated therein at page 183: "The only question we need consider is whether the exercise of that power, (power reserved to the states) in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution." It was then held that the state was in the same position as an individual and neither could deny the power if its exercise had been authorized by Congress.

It is readily seen that that case is not helpful here. The liability of the United States in the instant action must be resolved by determining whether sovereign immunity has been waived.

Express consent to be subject to liability under the act does not appear. A statute waiving sovereign immunity from suit is in derogation of sovereignty and is subject to strict construction. *Moore Ice Cream Co. v. Rose*, 289 U.S. 373; *United States v. Lindholm*, 79 F.2d 784; *Miller v. Pillsbury*, 128 p. 327. Sovereignty raises a presumption against suability. *Eastern Transport Co. v. United States*, 272 U.S. 675. The United States can only be sued by its own consent, clearly given by legislative act. 65 C.J. 1403 and cases

there cited. Prior to the passage of the Federal Tort Claims statute provisions was made by statute for the payment of compensation generally for disability or death of government employees resulting from injuries sustained while in the performance of duties and jurisdiction over claims therefor was given to the United States Employees' Compensation Commission, 5 U.S.C.A. Sections 751 et seq. The Federal Tort Claims Act grants to district courts exclusive jurisdiction over civil actions brought thereunder.

The United States is not ordinarily subject to its own law unless named in it. *Guarantee Title & Trust Co. v. Title Guaranty Co.*, 224 U.S. 152; *United States v. Herron*, 20 Wall 251; *In re Fowble*, 213 F. 676. That Congress has legislated protection for injured employees such as plaintiff negatives any implication of consent to sue the United States other than within the remedies provided.

Since consent is absent, this court is without jurisdiction. The motion to dismiss is granted.

Dated December 23rd, 1948.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed Dec. 24, 1948.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above named plaintiff, Walter J. Popovich, hereby appeals to the United States Circuit Court of Appeals for the Ninth (9th) Circuit from the final judgment and the whole thereof entered in this Court on or about the 24th day of December, 1948.

Dated February 4th, 1949.

HILDEBRAND, BILLS &
McLEOD,

By /s/ SHERIDAN DOWNEY, JR.,
Attorneys for Plaintiff.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 8, 1949.

Fidelity and Deposit Company of Maryland
Home Office, Baltimore

In the District Court of the United States, for the
Northern District of California, Southern Division

[Title of Cause.]

The premium charged for this bond is 10.00 Dollars
per annum.

Whereas the above named Walter J. Popovich has
prosecuted an appeal to the United States Circuit
Court of Appeals for the Ninth Circuit, to reverse the
judgment and decree of the District Court of the
United States in and for the Northern District of

California, Southern Division, in the above entitled cause.

Now, Therefore, in consideration of the premises, the undersigned, Fidelity and Deposit Company of Maryland, a corporation, duly organized and existing under the laws of the State of Maryland, and duly authorized and licensed by the laws of the State of California to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Plaintiff that the said Plaintiff will prosecute his said appeal to effect and answer all costs if he fails to make good his plea and appeal not exceeding the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, to which amount it acknowledges itself justly bound.

And Further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said surety is bound to pay on account of such breach and render judgment therefor against it and award execution therefor.

Signed, sealed and dated at Oakland, California, this 10th day of February, 1949.

FIDELITY AND DEPOSIT COMPANY OF
MARYLAND,

(Seal) By /s/ A. PHILIP MERRILL,
Attorney-in-Fact and Agent.

State of California,
County of Alameda—ss.

On this 10th day of February, A.D., 1949, before me Elouise Carraher, a Notary Public in and for the County of Alameda, residing therein, duly commissioned and sworn, personally appeared A. Philip Merrill, Attorney-in-Fact and Agent of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same, and also known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact and Agent of said corporation, and he acknowledged to me that he subscribed the name of said Fidelity and Deposit Company of Maryland thereto as Principal and his own name as Attorney-in-Fact and Agent.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Oakland and County of Alameda the day and year first above written.

(Seal) /s/ ELOUISE CARRAHER,
Notary Public in and for the City of Oakland, County
of Alameda, State of California.

My commission expires November 17, 1951.

[Endorsed]: Filed Feb. 17, 1949.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of the above entitled Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeal for the Ninth Circuit pursuant to an appeal allowed in the above entitled case, and to include all the pleadings, papers, records and documents in said case.

HILDEBRAND, BILLS &
McLEOD,

By /s/ CLIFTON HILDEBRAND,
Attorneys for Plaintiff.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed March 19, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents, listed below, are the originals filed in this court, or true and correct copy of an order entered on the minutes of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the appellant.

Complaint for Damages.

Motion to Dismiss and Notice of Motion.

Defendant's Points and Authorities in Support of Motion to Dismiss Complaint.

Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss.

Defendant's Reply Memorandum on Motion to Dismiss.

Minute Order of December 23, 1948—Granting Motion to Dismiss.

Order.

Notice of Appeal.

Undertaking on Appeal.

Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 19th day of March, A.D. 1949.

(Seal) C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12208. United States Court of Appeals for the Ninth Circuit. Walter J. Popovich, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 19, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12208

WALTER J. POPOVICH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DESIGNATION OF RECORD TO BE PRINTED
ON BEHALF OF APPELLANT

Appellant requests the Clerk of the above Court to have all parts of the record printed, including all pleadings and the opinion of the Court in granting respondent's motion to dismiss.

HILDEBRAND, BILLS &
McLEOD,

By /s/ SHERIDAN DOWNEY, JR.

STATEMENT OF POINTS ON WHICH
APPELLANT WILL RELY IN THIS APPEAL

Appellant appeals from the judgment of the trial court for the following reasons:

That the trial court erred in holding that the United States Government through its operation of the Alaska Railway is not subject to the terms and provisions of the Federal Employers' Liability Act

regulating injuries to employees when injured during the course of employment in interstate commerce.

HILDEBRAND, BILLS &
McLEOD,

By /s/ SHERIDAN DOWNEY, JR.

(Affidavit of Service by Mail attached.)

[Endorsed] : Filed Mar. 29, 1949. Paul P. O'Brien,
Clerk.

United States
Court of Appeals
for the Ninth Circuit

FREDA MARY VOKAL, CHARLES DAVISON
and ROMEYN B. SAMMONS, Executors of
the Estate of Paul F. Vokal, Deceased,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

United States
Court of Appeals
for the Ninth Circuit

FREDA MARY VOKAL, CHARLES DAVISON
and ROMEYN B. SAMMONS, Executors of
the Estate of Paul F. Vokal, Deceased,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

R. B. SAMMONS,
411 W. 5th St.,

FRANK C. SHOEMAKER,
5975 S. Broadway,
Los Angeles 3, Calif.

For Appellee:

JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
BERNARD B. LAVEN,
Assistants U. S. Attorney,
600 U. S. Post Office & Court House Bldg.,
Los Angeles 12, Calif. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

District Court of the United States for the
Southern District of California,
Central Division

Civil Action File No. 6045-WM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAUL F. VOKAL, FREDA MARY VOKAL,

Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon James M. Carter, Robert E. Wright, plaintiff's attorneys, whose address is 600 Federal Building, Los Angeles 12, Calif., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

(Seal)

EDMUND L. SMITH,
Clerk of Court.

By /s/ EDWARD F. DREW,
Deputy Clerk.

Date: 12/2/46. [10]

RETURN ON SERVICE OF WRIT

United States of America,
Southern District of California—ss:

I hereby certify and return that I served the annexed Summons & Complaint on the therein-named Paul F. Vokal and Freda Mary Vokal by handing to and leaving a true and correct copy thereof with them personally at their home in Pasadena in said District on the 6th day of December, 1946.

ROBERT E. CLARK,
U. S. Marshal.

By /s/ C. W. ROSS,
Deputy.

Marshal's Fees, \$4.00; mileage, \$.70; Total, \$4.70.

[Endorsed]: Filed Dec. 18, 1946. [11]

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT

United States of America, plaintiff, by James M. Carter, its attorney, in and for the Southern District of California, complains of Paul F. Vokal and Freda Mary Vokal, defendants, and, upon information and belief, alleges:

I.

That defendants reside in the County of Los Angeles, California; defendant Paul F. Vokal does business as a sole proprietor at 4626 Pacific Boule-

vard in the City of Los Angeles, and that defendant Freda Mary Vokal is the wife of defendant Paul F. Vokal.

II.

This action is brought pursuant to Title 28 U.S.C. Section 41(1) and Title 28 U.S.C. Section 400.

III.

That under date of December 19, 1944, a Renegotiation Agreement for the refund of excessive profits was entered into between plaintiff and [35] defendants, a copy of which is hereto annexed, marked Exhibit "A," and by reference made a part hereof.

IV.

The tax credit to which defendants are entitled under Section 3806 of the Internal Revenue Code is in the amount of Thirteen Thousand One Dollars and Twenty-two Cents (\$13,001.22). This tax credit is computed upon the assumption that profits determined to be excessive were returned as income by defendant for tax purposes and that the appropriate taxes have been or will be paid upon such profits.

V.

That defendants received a fully executed counterpart of said Renegotiation Agreement and written notice of the tax credit referred to in Paragraph IV of said agreement on July 7, 1945; that on July 13, 1945, defendants paid plaintiff the sum of Eleven Thousand One Hundred Thirty-six Dollars (\$11,136)

to apply on the amount due plaintiff pursuant to the terms of said agreement, but thereafter failed and defaulted in the making of any further or additional payments to apply in discharge of the amount due, pursuant to the terms of said Renegotiation Agreement.

VI.

Thereafter, the Secretary of War, acting pursuant to authority delegated to him by the Renegotiation Act and particularly Section 403(c)(2)(C) thereof, issued directives to Garrett Corporation, a corporation, California Institute of Technology, and Douglas Aircraft Company, Inc., directing said corporations and institution to withhold for the account of the United States from the amounts otherwise due to the defendant Paul F. Vokal as follows:

(a) On November 15, 1945, the Secretary of War ordered Garrett Corporation, a corporation, to so withhold the sum of Fifteen Thousand Dollars (\$15,000), which order was modified by a subsequent order dated May 28, 1946, whereby Garrett Corporation was directed to withhold the sum of Five Thousand One Hundred Twenty Dollars and Eighty-nine Cents (\$5,120.89), pursuant to which withholding order [36] as so amended, said Garrett Corporation has withheld for the account of the United States from amounts otherwise due to defendant Paul F. Vokal, the sum of Five Thousand One Hundred Twenty Dollars and Eighty-nine Cents (\$5,120.89).

(b) On November 15, 1945, the Secretary of War ordered California Institute of Technology to so

withhold the sum of Fifteen Thousand Dollars (\$15,000), which order was modified by a subsequent order dated May 28, 1946, whereby California Institute of Technology was directed to withhold the sum of Six Thousand Seven Hundred Seventy-eight Dollars and Fifteen Cents (\$6,778.15), pursuant to withholding order as so amended, said California Institute of Technology has withheld for the account of the United States from amounts otherwise due to defendant Paul F. Vokal, the sum of Six Thousand Seven Hundred Seventy-eight Dollars and Fifteen Cents (\$6,778.15).

(c) On May 5, 1946, the Secretary of War ordered Douglas Aircraft Company, Inc., to so withhold the sum of Three Thousand Dollars (\$3,000), which order was modified by a subsequent order dated May 28, 1946, whereby Douglas Aircraft Company, Inc., was directed to withhold the sum of Two Thousand Seven Hundred Sixty-three Dollars and Seventy-nine Cents (\$2,763.79), pursuant to which withholding order as so amended, said Douglas Aircraft Company, Inc., has withheld for the account of the United States from amounts otherwise due to defendant Paul F. Vokal, the sum of Two Thousand Seven Hundred Sixty-three Dollars and Seventy-nine Cents (\$2,763.79).

(d) The aggregate of the amounts so withheld as aforesaid, does not exceed the amount due the United States, pursuant to said Renegotiation Agreement, including interest, as provided by Paragraph IV of said agreement.

VII.

Garrett Corporation, a corporation, California Institute of Technology, and Douglas Aircraft Company, Inc., were all and each of them was, [37] a prime contractor during all of the time covered by said Renegotiation Agreement, engaged in the performance of contracts with the United States for the production of war material, and the defendant Paul F. Vokal was, during said time, a sub-contractor employed by said prime contractors to perform services and produce parts necessary to the performance of said prime contracts.

VIII.

Defendants have asserted that said Renegotiation Agreement is void and of no effect, have threatened said Garrett Corporation, California Institute of Technology, and Douglas Aircraft Company, Inc., with suit for the collection of the amounts so withheld, and defendant Paul F. Vokal has, in fact, filed two suits in the Superior Court of Los Angeles County for the recovery of the amounts withheld by said Garrett Corporation and California Institute of Technology, which said suits are entitled and numbered as follows:

Paul F. Vokal, Plaintiff, v. California Institute of Technology, Defendant. No. 510156;

Paul F. Vokal, Plaintiff, v. Garrett Corporation, a corporation, Defendant. No. 508756;

in each of which suits said Paul F. Vokal seeks re-

covery from each of the defendants named in said suits, of the amounts so withheld, on the ground as he asserts in said suits, that said Renegotiation Agreement is void and that the withholding orders aforesaid are without authority and void. Both of the suits so filed by defendant Paul F. Vokal in the Superior Court are still pending and undisposed of.

Wherefore, Plaintiff Prays for a Declaratory Judgment finding that said Renegotiation Agreement hereinabove referred to is wholly valid and enforceful; that the defendants have no interest in any amounts withheld by Garrett Corporation, a corporation, California Institute of Technology, and Douglas Aircraft Company, Inc., pursuant to the withholding orders aforesaid, and have no right to the recovery by suit or otherwise to any of said amounts; and that the defendant Paul F. Vokal be restrained from further prosecuting his [38] aforesaid suits now pending in the Superior Court against Garrett Corporation and California Institute of Technology; and that the plaintiff have such other and further relief as shall to the Court seem just and proper.

JAMES M. CARTER,
United States Attorney,

RONALD WALKER,
Assistant U. S. Attorney,

/s/ ROBERT E. WRIGHT,
Assistant U. S. Attorney,
Attorneys for Plaintiff. [39]

EXHIBIT "A"

W 04-235 AG PAS No. 498

War Contracts Price Adjustment Board

War Department

Army Air Forces

Air Technical Service Command

Western District

RENEGOTIATION AGREEMENT

This agreement is entered into as of the 19th day of December, 1944, by and between the United States of America (hereinafter referred to as "the Government") and Paul F. Vokal, a sole owner, doing business as Special Tools and Machinery Company, having his principal office at 4626 Pacific Boulevard, Los Angeles, California (hereinafter designated as "the Contractor"), and Freda Mary Vokal, a resident of the State of California, who, during all of the time referred to in this Agreement, was the wife of the aforementioned Paul F. Vokal, and who, by virtue of the Community Property Laws of the State of California affecting the property rights of husband and wife, is vested with certain rights and interest in and to the property of said Paul F. Vokal which is the subject matter of this Agreement, and by reason thereof made a party to this Agreement, and hereinafter designated as the "Wife."

1. Profits to be Eliminated. As a result of renegotiation pursuant to the Renegotiation Act, the Government and the Contractor hereby determine and agree that Thirty-eight Thousand Four Hundred

Forty-two Dollars and Twenty-six Cents (\$38,442.26) of the profits derived by the Contractor from contracts and subcontracts of the Contractor which are subject to renegotiation under the Renegotiation Act (hereinafter referred to as "said contracts and subcontracts") represent the amount of profits received or accrued under said contracts and subcontracts during the Contractor's fiscal year ended December 31, 1943 (hereinafter referred to as "said fiscal year"), which pursuant to the Renegotiation Act should be eliminated.

The amount of profits to be eliminated hereby has been determined by taking into consideration the application of the \$500,000 limitation set forth in subsection (c)(6) of the Renegotiation Act as interpreted by paragraph 348.3 of the Renegotiation Regulations.

2. Warranty. This agreement has been entered into in reliance, among [41] other things, upon the representations of the Contractor, including the financial and other data submitted by the Contractor upon the basis of which the statement set forth in Exhibit "A" annexed hereto and made a part hereof was prepared.

The Contractor warrants that the representations made by it to the Government in connection with this renegotiation are true and correct to the best knowledge, information and belief of the Contractor and that to his best knowledge, information and belief, the Contractor has disclosed all material facts required to make the Contractor's representations complete and not misleading.

3. Tax Credit Under Section 3806 of the Internal Revenue Code. The Contractor and the wife represent that the profits, the amount of which is agreed in Article 1 hereof to be eliminated, were included in income in the Contractor's and wife's Federal income tax returns for said fiscal year and that the Contractor and the wife have applied or will promptly apply for a computation by the Bureau of Internal Revenue, based upon the assessments made to the date of such computation, of the amount by which the taxes of the Contractor and his wife for said fiscal year payable under Chapter 1 of the Internal Revenue Code are decreased by reason of the application of Section 3806 of the Internal Revenue Code. The amount, if any, so computed will be allowed as a credit against the amount of profits agreed in Article 1 to be eliminated.

4. Terms of Payment. The Contractor agrees to pay to the Government the amount agreed in Article 1 hereof to be eliminated, less the tax credit, if any, applicable thereto pursuant to Article 3 within ten (10) days after the Contractor shall have received a fully executed counterpart of this agreement or written notice of the amount of the tax credit, whichever is later.

Payment shall be made by check to the order of the Treasurer of the United States and forwarded to the Commanding General attention of Budget and Fiscal Officer at 3636 Beverly Boulevard, Los Angeles, California. Interest at the rate of six (6) per centum per annum shall accrue and shall be payable upon each

payment due under this agreement from and after the due date thereof. [42]

5. Additional Profits to be Eliminated. If, as a result of the elimination of the amount of profits determined pursuant to Article 1 hereof, the Contractor shall either receive a refund (whether by repayment or credit) or shall recognize a reduction in its liability (by giving effect thereto on its books) in respect of any item which was allowed as an item of cost in the determination of such profits, then promptly thereafter, the Contractor shall pay to the Government, as additional profits which should be eliminated a sum equal to the amount of such refund or reduction in liability, by the delivery to the Commanding General attention of Budget and Fiscal Officer at 3636 Beverly Boulevard, Los Angeles, California, of a check payable to the order of the Treasurer of the United States in such amount.

In the elimination of said additional profits the Contractor shall be allowed the tax credit, if any, provided by Section 3806 of the Internal Revenue Code.

6. Covenant Against Contingent Fees. The Contractor warrants that he has not employed any person to solicit or secure this agreement upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warrant shall give the Government the right to annul this agreement.

7. Officials Not to Benefit. No member of or delegate to Congress or resident commissioner or any other person in the employ or service of the United

States shall be admitted to any share or part of this agreement or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this agreement if made with a corporation for its general benefit.

8. **Discharge of Liability.** This agreement shall be final and conclusive according to its terms, and performance by the Contractor in accordance herewith shall be in full discharge of all liability of the Contractor under the Renegotiation Act for excessive profits received or accrued under said contracts and subcontracts for the fiscal year covered hereby and, except upon a showing of fraud or malfeasance or a wilful misrepresentation of a material fact, this agreement shall not for the purpose of the Renegotiation Act be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and this agreement and any determination made in accordance herewith shall not be annulled, modified, set aside, or disregarded in any suit, action or proceeding.

9. **Renegotiation Rebate.** Nothing contained in this agreement shall prejudice any right which the Contractor may have to recover a renegotiation rebate pursuant to subsection (a)(4)(D) of the Renegotiation Act.

10. **Execution of Agreement.** This agreement has been duly executed by or on behalf of the Contractor pursuant to proper authority and by or on behalf of the Government by the War Contracts Price Adjust-

ment Board by his duly authorized representative to whom authority to execute this agreement has been delegated by the War Contracts Price Adjustment Board pursuant to subsection (d)(4) of the Renegotiation Act.

In Witness Whereof, the parties hereto have executed this agreement in three (3) counterparts as of the day and year above written.

/s/ PAUL F. VOKAL,

A sole owner, doing business under the firm name and style of Special Tools and Machinery Company.

/s/ FREDA MARY VOKAL,

UNITED STATES OF AMERICA,

By /s/ D. E. STACE,

Brigadier General, U.S.A. Commanding, Acting on behalf of the War Contracts Price Adjustment Board created by the Renegotiation Act, under due delegations of authority made pursuant to subsection (d)(4) of the Renegotiation Act.

Witnessed: This 19th day of December, 1944.

By M. L. HEARN

Address, 2208 Gatewood,
Los Angeles, Calif.

Page 6 of Renegotiation Agreement, Dated Dec. 19, 1944, with Special Tools, and Machinery Company. [44]

Special Tools and Machinery Company (A Sole Proprietorship)
Comparative Statement of Profit and Loss. Fiscal Year Ended
December 31, 1943.

(in dollars)	After Renegotiation		Before Renegotiation	
	Renego.	Total	Renego.	Non-Rene.Totl.
Sales (less allowances, discounts, etc.)				
Fixed Price	500,000	500,000	538,442	None 538,442
Cost of Sales (less discounts)	365,253	365,253	365,253	365,253
Selling and Advertising Expenses				
General and Administrative Expenses	32,837	32,837	32,837	32,837
Operating Profit	101,910	101,910	140,352	140,352
Other Applicable Items				
a. Interest Paid	143	143	143	143
b. Other Applicable Income	39,799	39,799	39,799	39,799
Profit before Adjustments..	141,566	141,566	180,008	180,008
Renegotiation Adjustments	23,952	23,952	23,952	23,952
Basic Profit for Renegotiation—				
Fixed Price	117,614	117,614	156,056	156,056
State Taxes Measured by Income	-----	-----	-----	-----
Total Profit Adjusted for Renegotiation	117,614	117,614	156,056	156,056
Renegotiation Adjustments Net		14,700		14,700
Net Profit before Provision for Federal Taxes on Income and Extraordinary Reserves		102,914		141,356
Tentative Amount of Determination.....			\$90,000.00	
Adjustment for State Taxes on Income.....			1,963.34	
“Excess Inventory” Adjustment			-----	
Net Determination			\$88,036.66	
Maximum Recapture allowable under Renegotiation Regulations, Sec. 348.3.....			\$38,442.26	

F.M.V. P.F.V.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 3, 1947. [45]

[Title of District Court and Cause.]

AMENDED ANSWER TO AMENDED COMPLAINT

The defendants, by Romeyn B. Sammons their attorney, for their amended answer to the amended complaint in the above-entitled action:

I.

Admit the allegations contained in paragraphs I, II, III and VIII of said amended complaint.

II.

Deny each and every allegation contained in paragraph IV of said amended complaint.

III.

Admit the allegations contained in paragraph V of said amended complaint, but allege that defendants paid said sum of \$11,136 on July 13, 1945, to plaintiff under protest and without prejudice to or waiver of their rights in the premises, and they further allege with respect thereto that plaintiff had no right to the receipt of said money under the Renegotiation Act of 1943, [99] and now has no right to the retention thereof, but that the same is the property of these defendants.

IV.

Deny each and every allegation contained in paragraph VI of said amended complaint, except they do not deny that plaintiff's agents ordered withheld from defendants the sums set forth in subdivisions (a), (b) and (c) thereof, at the times, in the manner,

and from such of defendants' debtors as are therein set forth.

V.

On information and belief deny each and every allegation contained in paragraph VII of said complaint, except they do not deny that defendant Paul F. Vokal performed services and furnished machine parts to the corporations therein mentioned.

VI.

Deny each and every allegation contained in said amended complaint not hereinbefore specifically admitted, controverted or denied.

For Their First Separate and Affirmative Defense to the Amended Complaint Herein the Defendants Allege on Information and Belief:

I.

That by reason of the facts hereinafter set forth, said instrument dated December 19, 1944, a copy whereof is annexed to the amended complaint and marked Exhibit A, is illegal and void; that the same lacks mutuality and reciprocity of consideration and obligation on the part of either of the parties thereto in that the plaintiff, its agents and servants had no jurisdiction of the subject matter thereof; that the agents and servants of the plaintiff committed fraud on defendants prior to and at the time of the signing of said instrument.

II.

That between April 15, 1944, and December 20, 1944, the [100] Price Adjustment Section, Headquarters, Western District, Air Technical Service

Command, local representatives of the War Contracts Price Adjustment Board, which latter was the agent of the plaintiff with respect to the matters hereinafter set forth; and which Board purported to be functioning and proceeding pursuant to and in compliance with the law and the Renegotiation Act of 1943, which was applicable to defendants as their fiscal year ended after June 30, 1943. That during said period of time said Board, its officers, agents and servants hereinafter termed the Board, in its said capacity, as agent for the plaintiff, for the purpose of inducing the defendants to enter into and execute said agreement of December 19, 1944, falsely and by fraud or malfeasance, or by willful misrepresentations, stated and represented to the defendants as follows, to-wit:

That defendants' gross receipts for the fiscal year 1943, subject to renegotiation under said Renegotiation Act of 1943, were \$538,442; that defendants' profits received or accrued therefrom and subject to said Act were \$156,055.59; that the sum of \$38,442.26 were excessive profits and subject to recapture pursuant to said Act; that the net amount actually to be recaptured from defendants after offsetting tax credits would be negligible in amount; that the computations and findings of said Board would be ratified and confirmed by the Bureau of Internal Revenue in its adjustment of defendants' income tax liabilities, and that said Bureau would adjust and determine defendants gross receipts and profits received or accrued in the same amount as found by said Board; that said Board was not bound by the

computations and conclusions of said Bureau in determining defendants' tax liabilities; that defendants had received or accrued gross receipts from renegotiable contracts for said fiscal year in excess of \$500,000; that defendants were subject to said Act of 1943; that defendants had received or accrued excessive profits for said fiscal year [101] within the purview and intent of said Act; that defendants had received or accrued profits during said fiscal year which were subject to said Act, were within the scope of the powers and jurisdiction of said Board, and that certain portions thereof were subject to recapture by said Board; that defendants were not entitled to the credit for and deduction from their gross receipts of the sum of \$22,888.88 expended and disbursed by them during 1943 as ordinary and necessary expenses of the business; that said Board had the power to arbitrarily add the sum of \$47,871.41 to defendants net income for such fiscal year 1943; that said Board had the authority to include the gross sales price of certain work in process in defendants' income for 1943, which aggregated the sum of \$45,162.58, even though such work in process represented items of certain unfinished and uncompleted contracts which were neither due, nor payable or collectable by defendants, nor lawfully accrued during said year 1943; that said Board had the right and power to disallow to defendants the amount of \$39,799.04 as the beginning inventory and other adjustments of defendants and to add said amount to the net income of defendants; that said Board had the power and authority to arbitrarily add the total sum

of \$84,993.83 (less the Board's adjustment of \$37,-122.46) to defendants' net income; that said Board had the power and authority to increase defendants true net income of \$108,184.18 to the sum of \$156,-055.59, an arbitrary increase of \$47,871.41; that offsetting tax credits of \$13,001.22 allowable under section 3806(b) of the Internal Revenue Code were the maximum amount to which defendants were entitled; that said offsetting tax credits could be lawfully computed and applied by said Board on an entirely different method and basis from that followed by the Bureau of Internal Revenue in computing defendants' income tax liabilities; that notwithstanding the provisions of section 403(i)(1)(D) of said Act of 1943 the same applied to the contracts and transactions [102] had by defendants with California Institute of Technology, a corporation and one of defendants' vendees, and that said Board had the power and authority to include in defendants' profits received or accrued and subject to renegotiation the sum of \$3,624.84 theretofore paid defendants by said Institute; that said Act of 1943 applied to certain other purchase orders, contracts, and transactions aggregating in amount \$65,576.50 received by defendants during said year 1943 from divers vendees, notwithstanding that the same were neither purchased by nor for the plaintiff, its Departments, agencies, servants, or for the end-use thereof, and no part of which were subject to renegotiation.

III.

That said statements and representations so made by said Board were wholly false and untrue. That

said Board made such statements and representations as of their own personal knowledge for the purpose of inducing defendants to act thereon and to execute said agreement with plaintiff, with the intent defendants would believe that such statements and representations were made on the Board's personal knowledge; that said Board assumed and intended and did convey to defendants the impression that they had actual knowledge of the matters so stated; that such statements and representations were so made by said Board without having knowledge whether they were true or false, and having no reasonable grounds to believe them to be true, or were conscious that they had no such knowledge, or were informed or knew of facts and circumstances sufficient to cause them to suspect the falsity thereof which facts and circumstances were unknown to defendants, or were made by said Board with reckless disregard of the injury which might thereby be caused to defendants; that the same were either known to be false when made or the Board should have known the same to be false; that the truth, if known to said Board, was concealed and suppressed from these defendants; that defendants [103] believed said statements and representations so made by said Board, and relied and acted thereon and signed said agreement to their great loss and damage as herein appears; that defendants had no part in the preparation of said agreement, were not consulted in its drafting or regarding its contents, and were given no alternative except to sign the same or

face a unilateral order fixing their alleged excessive profits.

IV.

That during said period of several months prior to the execution of said Agreement of December 19, 1944, said Board examined and audited defendants' books and accounts on several occasions and were supplied by defendants with all the information requested by said Board and which was known to defendants; that said Board was fully and adequately informed regarding all transactions of defendants, and expended much time and effort investigating defendants' operations. That by reason of such audits and examinations said Board knew, or should have known, that the purchase orders and transactions aforesaid, and the defendants likewise, were wholly exempt from renegotiation under said Act of 1943, as well as under the Board's Regulations, and the instructions issued to it by the Judge Advocate General.

V.

That said Board unlawfully and erroneously applied section 403(a)(6) of said Act, in that they denied to defendants the benefit of the exemption of \$500,000 granted therein by arbitrarily declaring all the excess in alleged receipts of \$38,442.26 over said exemption to be excessive profits, when by the terms of said section said sum of \$38,442.26 if actually received or accrued, was a part of defendants' gross receipts and therefore subject to deduction of a proportional percentage of operating costs in the same percentage as in the receipts and accruals constitut-

ing said \$500,000 exemption for said year 1943. That the sum of \$32,160.84 [104] is the amount of operating costs and expenses which would be properly deductible from said sum of \$38,442.36, leaving only the balance of \$6,281.42 as alleged excessive profits in excess of said exemption of \$500,000, based on the assumption of the Boards computations aforesaid. That such application of said Renegotiation Act of 1943 by said Board is repugnant to said Act, and to sub-section 1 of Section 8 of Article I of the United States Constitution, in that it is discriminatory, is not uniformly applied as required by said section, deprives defendants of said exemption, and resulted in taking defendants' property without due process of law without just compensation in violation of the Fifth Amendment to said Constitution.

VI.

Said Board exceeded its power, authority, and jurisdiction in the following particulars, to-wit:

(a) It increased defendants' net income from said sum of \$108,184.18 to said amount of \$156,055.59 by adding thereto alleged profits not received or accrued as specified and limited in said Renegotiation Act of 1943.

(b) It rejected deductions for necessary and ordinary expenses of the defendants' business for said year 1943, and thereby unlawfully and arbitrarily increased their alleged profits.

(c) It denied defendants' exemption from all renegotiation under said Act, even though defendants' gross receipts from transactions within the purview

of said Act were less than the \$500,000 exemption granted by said section 403(c) (6) thereof.

(d) It declared all moneys in excess of \$500,000 exemption to be excessive profits received and accrued, and recaptured the same by means of said agreement.

(e) It arbitrarily included in defendants' gross income receipts from nonrenegotiable purchase orders and transactions, and included moneys not received or accrued as required by said Act.

(f) It executed said agreement, and required defendants so to do, even though the subject matter thereof was not within the scope of said Act or of the jurisdiction of said Board.

(g) It included in said agreement recitals of facts which were and are wholly false and untrue, and which were known to be such by said Board.

For Their Second Defense to the Amended Complaint Herein the Defendants Allege:

I.

The defendants repeat and reallege as a part of this defense each and all the allegations and denials contained in paragraphs I to VI of their Answer, and paragraphs I to VI of their First Affirmative Defense with like effect and as if herein set forth in full.

II.

That the total amount ordered withheld by said Board, as set forth in paragraph VI of the complaint, from defendants' debtors, namely: Garrett Corporation, a corporation; California Institute of Technol-

ogy, and Douglas Aircraft Company, Inc., and placed within and now held and retained in the exclusive control of plaintiff is the sum of \$14,662.83. That by reason of the facts hereinbefore alleged the plaintiff is indebted to defendants in said sum together with interest thereon at 6% per annum from the respective dates of each such withholding, and the defendants are entitled to the repayment thereof.

For Their Third Defense to the Amended Complaint
Herein the Defendants Allege:

I.

That paragraph 8 of said Agreement of December 19, 1944, which purports to make the same final and conclusive according to its terms, is predicated on and recites verbatim section 403(c)(4) of said Renegotiation Act of 1943. That said paragraph 8 and said section 403(c)(4) are repugnant and contrary to public policy and to sections 1 and 2 of Article III of the Constitution of the United States, in [106] that they attempt to and do deprive the constitutional courts of the United States of their inherent jurisdiction in equity and at law to interpret, construe, reform, rescind, to hold unlawful and set aside said Board's action, their findings and conclusions found to be arbitrary, capricious, abuse of discretion, not in accordance with law, contrary to constitutional rights, powers, privilege, or immunity, in excess of statutory jurisdiction, authority or limitations, and to determine the validity of said instrument, to deprive said courts of power to restrain public officers and agencies from transgressing their powers and authority; to deprive, and do now deprive, defend-

ants of relief in equity and at law to which they are entitled and which is guaranteed to them by said Constitution and its Amendments thereto; that said paragraph 8 of said Agreement and said section 403(c) (4) of said Act stand as a bar to the only relief adequate and available for defendants; that the same are discriminatory and arbitrary and deny valuable rights and privileges to defendants while conferring them on others; that they unlawfully delegate to agents of plaintiff the power to take defendants' property without due process or just compensation, are confiscatory and arbitrary, and are therefore void.

II.

That said paragraph 8 of said Agreement and said section 403(c) (4) of said Renegotiation Act of 1943 are repugnant to the federal Administrative Procedure Act (5 U. S. C. A. secs. 100 et seq.), and more particularly to sections 1008 and 1009 thereof, in that they disregard the jurisdictional limitations imposed by section 403(a) (6), 403(a) (9), 403(a) (B), 403(c) (1) and (3), 403(c) (6) and 403(i) (1) (D) of said Renegotiation Act of 1943, and which are enforceable under section 1008 of said Administrative Procedure Act, and in that they deny to the courts the duty and power of review granted by section 1009 of said Administrative Procedure Act. [107]

For Their Fourth Defense to the Amended Complaint Herein the Defendants Allege:

That by reason of the facts, circumstances and grounds hereinbefore alleged in defendants' First, Second and Third Defenses which are hereby made

a part hereof with the same force and effect as though herein set forth in full, the defendants were induced to, and did, on or about July 11, 1945, pay the sum of \$11,136 to said Board, but, nevertheless, paid the same under protest and without prejudice to, or any waiver of, defendants' rights in the premises. That subsequent to such payment and on or about October 23, 1945, defendants received a statement "of the facts and reasons" for the determination made by said Board pursuant to section 403(c)(1) of said Act, whereby, inter alia, the defendants first discovered that they were not subject to said Renegotiation Act of 1943 or to the jurisdiction of said Board, and that plaintiff had no right to the receipt of said money and has none to the retention thereof. That therefore said sum of \$11,136 is due and owing from plaintiff to the defendants together with the interest thereon from the date of payment thereof.

For Their Fifth Defense Herein the Defendants
Allege:

That the Treasury Department of plaintiff, through its Bureau of Internal Revenue found and determined defendants' income for tax liability purposes for said year 1943 was \$108,184.18, which was \$47,871.41 less in amount than theretofore found by said Board. That said Board and plaintiff are bound by such determination of the Treasury Department as appears from instructions of the Judge Advocate General to the Price Adjustment Sections, Text No. 12-219, pp. 403, 404, and also by the Regulations of said Board.

For Their Sixth Defense Herein the Defendants
Allege:

That neither said Board, nor its agents or servants, were or are vested with any power or authority to make any order, take any action, or enter into any agreement in excess of the power and authority conferred upon them by said Renegotiation Act of 1943, and when said [108] Board exceeded its jurisdiction as hereinbefore set forth the execution of said Agreement of December 19, 1944, was a nullity, not binding the parties thereto.

Wherefore, defendants pray for a declaratory judgment finding as follows, to-wit:

(a) That said Agreement of December 19, 1944, is illegal and void.

(b) That defendants' net income for the fiscal year 1943 as defined by said Renegotiation Act of 1943 was the sum of \$108,184.18, as determined by the Treasury Department as aforesaid, and said Board is bound thereby.

(c) That defendants are wholly exempted from renegotiation under said Act.

(d) That said War Contracts Price Adjustment Board, its agents, representative and servants exceeded their jurisdiction and powers in the premises.

(e) That said Board, its agents and servants practiced fraud and malfeasance upon defendants within the purview of said Act.

(f) That defendants are discharged from all lia-

bility under said Agreement and from under said Act.

(g) That defendants are entitled to recover all the moneys ordered withheld for the account of plaintiff from defendants' debtors, Garrett Corporation, California Institute of Technology, and Douglas Aircraft Company, Inc., aggregating the sum of \$14,-662.83, together with the interest thereon at 6% per annum from date of withholding.

(h) That plaintiff is indebted to defendants in the sum of \$11,136 heretofore paid under protest with interest thereon from July 11, 1945.

(i) That defendants have such other and further relief as may be just and equitable.

/s/ R. B. SAMMONS,
Attorney for Defendants. [109]

I certify that I have mailed a copy of the foregoing Amended Answer to James M. Carter, United States Attorney c/o Robert E. Wright, Assistant U. S. Attorney, 600 Federal Building, Los Angeles 12, California, this 16th day of October, 1947.

/s/ R. B. SAMMONS,
Attorney for Defendants.

[Endorsed]: Filed Oct. 16, 1947. [110]

[Title of District Court and Cause.]

ORDER SUBSTITUTING EXECUTORS OF
DECEASED DEFENDANT'S ESTATE AS
PARTIES DEFENDANTS

This matter was heard on motion of R. B. Sammons for an order substituting Freda Mary Vokal, Charles Davison, and Romeyn B. Sammons as parties defendants herein in place of Paul F. Vokal, deceased, and it appearing to the Court that Paul F. Vokal died on the 28th day of June, 1948, and that said Freda Mary Vokal, Charles Davison and Romeyn B. Sammons are the duly appointed and qualified Executors of the Estate of said Paul F. Vokal, deceased, it is

Ordered, that Freda Mary Vokal, Charles Davison and Romeyn B. Sammons be and they are hereby substituted as parties defendants herein in place of Paul F. Vokal, deceased, without prejudice to the proceedings heretofore had herein.

Dated October 4, 1948.

/s/ WM. C. MATHES,
Judge.

[Endorsed]: Filed Aug. 5, 1948. [116]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT FOR PLAINTIFF AND AGAINST DEFENDANTS, UNDER F.R.C.P. 56 (a)

To the Defendants Freda Mary Vokal, Charles Davison, and Romeyn B. Sammons, Executors of the Estate of Paul F. Vokal, Deceased; and Their Attorneys Romeyn B. Sammons and Frank C. Shoemaker:

Please Take Notice that on Monday, November 22, 1948, at ten o'clock a.m., or as soon thereafter as counsel may be heard, the United States of America, by and through its counsel James M. Carter, United States Attorney, Clyde C. Downing and Bernard B. Laven, Assistant United States Attorneys, will move the above-entitled Court, Honorable William C. Mathes, Judge presiding, in the Courtroom of the Federal Building at Spring and Temple Streets, Los Angeles, California, that summary judgment be entered, in accordance with the Federal Rules of Civil Procedure, in favor of the plaintiff United States of America and against the defendants Freda Mary Vokal, Charles Davison, and Romeyn B. Sammons, Executors of the Estate of Paul F. Vokal, deceased; said Motion is based upon the pleadings, papers and stipulation on file herein, and upon the grounds that the pleadings, papers and [117] stipulation on file herein show there is no genuine issue as to any material fact and that the plaintiff United States of America, the moving party herein, is entitled to judgment

against the defendants and each of them as a matter of law.

Dated this 9th day of November, 1948.

JAMES M. CARTER,

United States Attorney.

CLYDE C. DOWNING,

Assistant United States Attorney, Chief, Civil Division.

/s/ BERNARD B. LAVEN,

Assistant United States
Attorney.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Nov. 9, 1948. [118]

[Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO PROPOSED SUMMARY JUDGMENT

The defendants pursuant to Local Rule 7, respectfully interpose their objections to the Summary Judgment proposed by plaintiff's counsel, to-wit:

I.

To paragraph A thereof adjudging that said Renegotiation Agreement dated December 19, 1944, for refund of excessive profits is valid and enforceable, for the reason that it sufficiently appears by defendants' answer that execution of said agreement was induced by fraud, misrepresentation, and mutual mistakes of law and fact.

II.

To paragraph B thereof for the reason that, it sufficiently appears in defendants' answer that said withholding orders directed to defendants' customers, Garrett Corporation, California Institute of Technology, and Douglas Aircraft Co., Inc., were null and void [136] for lack of jurisdiction on the part of plaintiff's agents to issue.

III.

To paragraph C thereof, for the reason that it sufficiently appears in defendants' answer that plaintiff never had jurisdiction over defendants or their profits for the year 1943, and that all moneys withheld from defendants still remain their property and are unlawfully withheld by plaintiff from them.

IV.

To paragraph D thereof, for the reasons that said actions No. 510156 and 508756 now pending in the Superior Court of Los Angeles County for the recovery of the moneys claimed by plaintiff herein were instituted prior to this action in the District Court, were properly available to these defendants against its customers, were not and are not forbidden expressly or impliedly by the Renegotiation Acts, nor made dependent upon completion of Tax Court proceedings, and every question raised by the pleadings herein can be determined in said actions; that defendants are subcontractors and are entitled to their remedies against their said contractors.

V.

To paragraph E thereof for the reasons hereinabove stated.

Dated December 17, 1948.

/s/ R. B. SAMMONS,
FRANK C. SHOEMAKER,
Attorneys for Defendants.

[Endorsed]: Filed Dec. 17, 1948. [137]

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS TO PLAINTIFF'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The defendants pursuant to Local Rule 7, through their counsel, hereby interpose their objections to the Findings of Fact and Conclusions of Law proposed by plaintiff's counsel, to-wit:

I.

To Findings I thereof, for the reason that it sufficiently appears by defendants' answer that there are many issues as to material facts.

II.

To Finding IV thereof, for the reason that it sufficiently appears by defendants' answer that the tax credit to which defendants are entitled under section 3806 of the Internal Revenue Code exceed said sum of \$13,001.23.

III.

To Finding V thereof, for the reason that the Tax Court of the [138] United States had no jurisdiction of the matters involved herein.

IV.

To Finding VI thereof, for the reason that it sufficiently appears by defendants' answer that the execution of said contract of December 19, 1944, was induced by fraud, misrepresentation and mutual mistakes of law and fact.

V.

To Finding VII thereof, for the reason that said first, third, fifth and sixth defenses alleged in said amended answer are material defenses.

VI.

To Finding VIII thereof, for the reason that the United States instituted the action at bar and the defense is good as a recoupment. That the plaintiff cannot as against the claims of innocent parties hold their money which has gone into its treasury through the means of the fraud or mistake of its agents.

VII.

To Finding IX thereof, for the reasons stated.

To the Conclusions of Law thereof A to D for the reasons stated.

Dated December 17, 1948.

/s/ R. B. SAMMONS,

FRANK C. SHOEMAKER,

Attorneys for Defendants.

I certify that I have mailed a copy of the foregoing Objections to Bernard B. Laven, Assistant United States Attorney, 600 Federal Building, Los Angeles 12, California, this 17th day of December, 1948.

/s/ R. B. SAMMONS,
Defendants' Attorney.

[Endorsed]: Filed Dec. 17, 1948. [139]

[Title of District Court and Cause.]

FINDINGS OF FACT

The Motion of the plaintiff in the foregoing entitled case for Summary Judgment for plaintiff and against defendants, pursuant to Rule 56a of the Federal Rules of Civil Procedure, having been duly and regularly made and presented to the Court on the 22nd day of November, 1948, before the Honorable William C. Mathes, Judge presiding, James M. Carter, United States Attorney for the Southern District of California, Clyde C. Downing and Bernard B. Laven, Assistant United States Attorneys, appearing for plaintiff, Romeyn B. Sammons and Frank C. Shoemaker appearing for the defendants; and the Court having considered the pleadings, affidavits, exhibits, admissions and briefs of counsel, the cause was argued and submitted to the Court for consideration, decision and determination; and the Court, now being fully advised in the premises, makes the following Findings of Fact and Conclu-

sions of Law constituting the decisions of the Court in said action; [140]

I.

That there is no genuine issue as to any material fact and that plaintiff herein is entitled to a summary judgment as a matter of law.

II.

That the defendant Paul F. Vokal died on the 28th day of June, 1948, and that by Order of Court on the 4th day of October, 1948, Freda Mary Vokal, Charles Davison, and Romeyn B. Sammons, were substituted as executors in the place and stead of the said Paul F. Vokal as defendant herein;

III.

That each and all of the allegations set forth in paragraphs I, II, III, V, VI, VII and VIII of plaintiff's Amended Complaint are true;

IV.

That the tax credit to which the defendants are entitled under Section 3806 of the Internal Revenue Code is in the amount of \$13,001.22;

V.

That the Court further finds that the defendants' testator failed to file in the Tax Court of the United States any petition for redetermination of the amount of excessive profits as permitted by Section 403(e)(1) of the Renegotiation Act [50 U.S.C.

(App.) §1191 (e)(1)], notwithstanding the determination made by the War Contracts Price Adjustment Board;

VI.

That the defendants have not pleaded or offered to prove any fraud or malfeasance or wilful misrepresentation inducing the execution of the contract admitted to have been executed in paragraph III of plaintiff's Amended Complaint;

VII.

That the first, third, fifth and sixth defenses alleged in the Amended Answer of the defendants to plaintiff's Amended Complaint are insufficient as a matter of law and are hereby stricken upon the Court's own motion pursuant to Rule 12(f) of the Federal Rules of Civil Procedure;

VIII.

That the second and fourth defenses present cross-claims against the United States, each for a sum in excess of \$10,000, on which the plaintiff, the United States of America, as sovereign, has not consented to be sued in this Court, and this Court accordingly has no jurisdiction to render judgment on such cross-claims;

IX.

That each and all of the allegations set forth in defendants' Amended Answer to plaintiff's Amended Complaint inconsistent with the Findings of Fact herein are untrue.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts the Court concludes:

A. That the plaintiff having heretofore filed and presented a Motion for Summary Judgment, the said Motion is hereby granted;

B. That there exists no genuine issue as to any material fact involved in determining the right of recovery in this cause; and

C. Plaintiff is therefore entitled to judgment as prayed for in the Amended Complaint as a matter of law;

D. Let judgment be entered accordingly.

Dated this 18th day of December, 1948.

/s/ WM. C. MATHES,

United States District Judge.

(Duly Verified.)

(Affidavit of Service by Mail.)

[Endorsed]: Filed Dec. 20, 1948. [142]

In the United States District Court in and for the
Southern District of California, Central Division

No. 6045—WM Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FREDA MARY VOKAL, CHARLES DAVISON,
and ROMEYN B. SAMMONS, Executors of the
Estate of Paul F. Vokal, Deceased,

Defendants.

SUMMARY JUDGMENT

The Motion of the plaintiff in the foregoing entitled cause for Summary Judgment for plaintiff and against defendants, pursuant to Rule 56a of the Federal Rules of Civil Procedure, having been presented to the Court, the Honorable William C. Mathes, Judge presiding, and submitted for decision, and the Court having considered the pleadings, affidavits, exhibits, admissions and briefs filed by counsel for plaintiff and defendants, and having heard oral argument of counsel for plaintiff and defendants upon the whole case; and having considered said Motion for Summary Judgment for plaintiff and being fully advised in the premises; and written findings of fact and conclusions of law having been signed by the Court and good cause appearing therefor;

It Is Hereby Ordered, Adjudged and Decreed

that plaintiff's Motion for Summary Judgment be and the same hereby is granted; and

It Is Further Hereby Ordered, Adjudged and Decreed as follows:

A. That the Renegotiation Agreement dated December 19, 1944, for [144] refund of excessive profits entered into between plaintiff and defendants (Paul F. Vokal and Freda Mary Vokal), a copy of which is annexed to plaintiff's Amended Complaint and marked Exhibit A by reference, is valid and enforceable;

B. That the defendants have no interest in any amount withheld by the Garrett Corporation, California Institute of Technology, and Douglas Aircraft Company, Inc., pursuant to withholding orders directed to said corporations, as alleged in paragraph VI of plaintiff's Amended Complaint;

C. That defendants have no right to the recovery by suit or otherwise of any of the amounts so withheld;

D. That the defendants, Freda Mary Vokal, Charles Davison, and Romeyn B. Sammons, Executors of the Estate of Paul F. Vokal, Deceased, their agents, servants and attorneys are forever restrained from further prosecuting the following entitled and numbered suits in the Superior Court of Los Angeles County, State of California, as follows: Paul F. Vokal, plaintiff, v. California Institute of Technology, defendant; No. 510156; Paul F. Vokal, plaintiff, v. Garrett Corporation, a corporation, defendant; No. 508756;

E. That plaintiff do have and recover of and from the defendants its costs and charges expended and have execution therefor. Costs taxed at \$24.70.

Dated: This 18th day of December, 1948.

/s/ WM. C. MATHES,
United States District Judge.

The undersigned attorney for plaintiff hereby approves the foregoing Judgment as to form.

Dated: This 14th day of December, 1948.

JAMES M. CARTER,
United States Attorney.
CLYDE C. DOWNING,
Assistant United States
Attorney.

/s/ BERNARD B. LAVEN,
Assistant United States
Attorney.

The undersigned attorneys for defendants hereby approve the foregoing Judgment as to form.

Dated: This day of December, 1948. [145]

ROMEYN B. SAMMONS,
FRANK C. SHOEMAKER,
Attorneys for Defendants.

Judgment entered Dec. 20, 1948. Docketed, Dec. 20, 1948. Book 54, Page 596. Edmund L. Smith, Clerk.

[Endorsed]: Filed Dec. 20, 1948. [146]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given,

That Freda Mary Vokal, Charles Davison, and Romeyn B. Sammons, Executors of the Estate of Paul F. Vokal, deceased, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 20th day of December, 1948.

/s/ R. B. SAMMONS,
FRANK C. SHOEMAKER,
Attorneys for Defendants.

Mailed copy to U. S. Attorney, Feb. 15, 1949.
Edmund L. Smith, Clerk.

[Endorsed]: Filed Feb. 15, 1949. [148]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Defendants set forth the following points on which they intend to rely on appeal, to-wit:

I.

The court erred in sustaining plaintiff's motion for summary judgment.

II.

The court erred in not overruling plaintiff's motion for summary judgment.

III.

The court erred in holding that the Renegotiation Agreement, dated December 19, 1944, for the refund of alleged excessive profits is valid and enforceable. [149]

IV.

The court erred in holding that defendants have no interest in any amount withheld by their testator's debtors pursuant to certain withholding orders directed thereto by plaintiff's agents.

V.

The court erred in holding that defendants have no right to the recovery by suit or otherwise to any amounts so withheld.

VI.

The court erred in restraining defendants from further prosecuting those certain actions in the Los Angeles Superior Court entitled: Paul F. Vokal, et ux. v. Garrett Corporation, numbered 508,756; and Paul F. Vokal et ux. v. California Institute of Technology, numbered 510,156, to recover certain moneys from their testator's debtors.

VII.

The Court erred in holding that there was no genuine issue as to any material fact, and that plaintiff was entitled to a summary judgment as a matter of law.

VIII.

The court erred in holding that each and all of the allegations set forth in paragraph VI of its complaint are true.

IX.

The court erred in holding that the full tax credit to which defendants' are entitled under section 3806 of the Internal Revenue Code was only \$13,001.22.

X.

The court erred in holding that defendants failure to file a petition in the Tax Court of the United States for redetermination of the amount of excessive profits pursuant to section 403(e)(1) of the Renegotiation Act of 1943 (50 U.S.C. (App.) (e)(1) was material, and the implied finding that defendants were in any wise bound to file such petition, or could have filed such petition in the circumstances in which defendants were placed. [150]

XI.

The court erred in holding that defendants did not plead or offer to prove fraud or wilful misrepresentation, or malfeasance inducing the execution of said Agreement of December 19, 1944, and mentioned in and attached to plaintiff's complaint.

XII.

The court erred in striking the first, third, fifth and sixth defenses alleged in defendants' answer as insufficient as a matter of law.

XIII.

The court erred in holding that the district court had no jurisdiction to render judgment for defendants on the second and fourth defenses set forth in the amended answer.

XIV.

The court erred in holding that each and all of the allegations set forth in defendants' amended answer inconsistent with the Findings of Fact were untrue.

XV.

The court erred in holding that plaintiff was entitled to judgment as prayed as matter of law.

Dated this 18th day of February, 1949.

R. B. SAMMONS,
FRANK C. SHOEMAKER,
Attorneys for Defendants.

By /s/ R. B. SAMMONS.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 18, 1949. [151]

[Title of District Court and Cause.]

DESIGNATION OF RECORD FOR APPEAL

To the Clerk of the District Court of the United States for the Southern District of California, Central Division:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal heretofore, and on February 15th, 1949, filed by the Defendants in the above-entitled cause, transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said Court, and to include in such transcript of record the following documents, or certified copies thereof, to-wit:

1. Complaint and Summons.
2. Answer and counterclaim.
3. Amended complaint.
4. Answer to Amended Complaint and Counterclaim. [153]
5. Plaintiff's Pre-Trial Memorandum.
6. Defendants' Pre-Trial State of Facts and Reply Memorandum of Law.
7. Amended Answer to Amended Complaint.
8. Stipulation of Parties Pursuant to Order of Pre-Trial Hearing.

9. Defendants' motion and order for substitution of Executors as defendants.

10. Notice of Motion for Summary Judgment for Plaintiff.

11. Defendants' Points and Authorities in opposition to Motion for Summary Judgment.

12. Order on Motion for Summary Judgment.

13. Defendants' Objections to proposed Summary Judgment.

14. Notice by Clerk of Entry of Judgment.

15. Findings of Fact and Conclusions of Law.

16. Summary Judgment.

17. Notice of Appeal with date of Filing.

18. Statement of Points on Appeal; Assignment of Errors.

19. This Designation of Record.

Dated this 18th day of February, 1949.

R. B. SAMMONS and
FRANK C. SHOEMAKER,
Attorneys for Defendants.

By /s/ R. B. SAMMONS.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 18, 1949. [154]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDI-
TIONAL MATTER FOR RECORD

The appellee, through its counsel, in accordance with Rule 75 (a) of the Rules of Civil Procedure, designates for inclusion in the record on appeal, in addition to those designations made by appellant, the following:

Points and Authorities in Support of Motion for Summary Judgment by Plaintiff against Defendants.

JAMES M. CARTER,
United States Attorney.

CLYDE C. DOWNING,
Assistant United States Attorney, Chief, Civil Division.

/s/ BERNARD B. LAVEN,
Assistant United States Attorney, Counsel for Plaintiff-Appellee.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 23, 1949. [156]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 157, inclusive, contain the original Complaint for Money Judgment; Summons and Return of Service; Answer and Counterclaim; Amended Complaint for Declaratory Judgment; Answer to Amended Complaint and Counterclaim; Plaintiff's Pre-Trial Memorandum; Defendants' Pre-Trial Statement of Facts and Reply Memorandum of Law; Amended Answer to Amended Complaint; Stipulation of Parties Pursuant to Order of Pre-Trial Hearing; Motion and Order Substituting Executors as Parties Defendants; Notice of Motion for Summary Judgment for Plaintiff and Against Defendants Under F.R.C.P. 56(a); Points and Authorities in Support of Motion for Summary Judgment by Plaintiff Against Defendants; Points and Authorities for Defendants in Opposition to Motion for Summary Judgment; Order on Motion for Summary Judgment; Defendants' Objections to Proposed Summary Judgment and Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Summary Judgment; Notice of Entry of Judgment; Notice of Appeal Statement of Points on Appeal; Designation of Record on Appeal and Appellee's Designation of Additional Matter for Record which constitute the record on ap-

peal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 18th day of March, A.D. 1949.

[Seal]

EDMUND L. SMITH,
Clerk.

[Endorsed]: No. 12209. United States Court of Appeals for the Ninth Circuit. Freda Mary Vokal, Charles Davison and Romeyn B. Sammons, Executors of the Estate of Paul F. Vokal, Deceased, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 21, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12209

FREDA MARY VOKAL, CHARLES DAVISON,
and ROMEYN B. SAMMONS, Executors of the
Estate of Paul F. Vokal, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF RECORD

To the Clerk of the United States Court of Appeals
for the Ninth Circuit:

Appellants, pursuant to Rule 19(6) of this court,
hereby set forth the following points on which they
intend to rely on this appeal, to-wit:

That the District Court of the United States for
the Southern District of California, Central Divi-
sion, erred in the following particulars, viz:

Point I.

In sustaining appellee's motion for summary
judgment.

Point II.

In not overruling appellee's motion for summary
judgment.

Point III.

In holding that the Renegotiation Agreement, dated December 19, 1944, for the refund of alleged excessive profits is valid and enforceable.

Point IV.

In holding that appellants have no interest in any amount withheld by their testator's debtors pursuant to certain withholding orders directed thereto by appellee's agents.

Point V.

In holding that appellants have no right to the recovery by suit or otherwise to any amounts so withheld.

Point VI.

In restraining appellants from further prosecuting those certain actions in the Los Angeles Superior Court, entitled: Paul F. Vokal, et ux., plaintiffs v. Garrett Corporation, defendant, numbered 508756; and Paul F. Vokal, et ux., plaintiff's v. California Institute of Technology, defendant, numbered 510156, to recover certain moneys from their testator's debtors.

Point VII.

In holding that there was no genuine issue as to any material fact, and that appellee was entitled to a summary judgment as a matter of law.

Point VIII.

In holding that each and all of the allegations set forth in paragraph VI of appellee's complaint are true.

Point IX.

In holding that the full tax credit to which appellants are entitled under section 3806 of the Internal Revenue Code was only \$13,001.22.

Point X.

In holding that appellants' failure to file a petition in the Tax Court of the United States for the redetermination of the amount of alleged excessive profits pursuant to section 403(e)(1) of the Renegotiation Act of 1943 (50 U.S.C. (App.) (e) (1) was material, and the implied finding that appellants were in any wise bound to file such petition in the circumstances in which appellants were placed.

Point XI.

In holding that appellants did not plead or offer to prove fraud or wilful misrepresentation, or malfeasance inducing the execution of said Agreement of December 19, 1944, and mentioned in and annexed to appellee's complaint.

Point XII.

In striking the first, third, fifth and six defenses alleged in appellants' answer as insufficient as a matter of law.

Point XIII.

In holding that the District Court had no jurisdiction to render judgment for appellants on the second and fourth defenses set forth in the amended answer.

Point XIV.

In holding that each and all of the allegations set forth in appellants' amended answer inconsistent with the Findings of Fact were untrue.

Point XV.

In holding that appellee was entitled to judgment as prayed as matter of law.

DESIGNATION OF RECORD ON APPEAL

You are requested to include in the printed record the following parts set forth in the certified record of the Clerk of the District Court, which appellants deem necessary for the consideration of their Points on this appeal, to-wit:

Complaint for Declaratory Judgment, amended.

Answer to Amended Complaint, amended.

Designation of Record on Appeal, appellants'.

Designation of Record on Appeal, Appellee's.

Notice of Appeal, proof of service.

Statement of Points on Appeal.

Defendants' Objections to plaintiff's Findings of Fact and Conclusions of Law.

Defendants' Objections to proposed summary judgment.

Findings of Fact and Conclusions of Law.

Motion for Summary Judgment, plaintiff's.

Summary Judgment.

Summons.

Dated: March 18, 1949.

R. B. SAMMONS and

FRANK C. SHOEMAKER,

Attorneys for Appellants.

By /s/ R. B. SAMMONS.

[Endorsed]: Filed March 21, 1949.

No. 12209

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FREDA MARY VOKAL, CHARLES DAVISON, and ROMEYN
B. SAMMONS, Executors of the Estate of Paul F. Vokal,
deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

R. B. SAMMONS,

FRANK C. SHOEMAKER,

5975 South Broadway, Los Angeles 3,

Attorneys for Appellants.

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Appellants have the right to interpose any defenses they may have had to the original proceedings, are entitled to such affirmative relief that may be pleaded and the facts warrant, and the issues so presented are justiciable issues within the jurisdiction of the District Court to determine.... 31

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No. 12209

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FREDA MARY VOKAL, CHARLES DAVISON, and ROMEYN
B. SAMMONS, Executors of the Estate of Paul F. Vokal,
deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

Jurisdiction.

This is an appeal from a summary judgment of the District Court of the United States for the Southern District of California, Central Division, entered on December 20, 1948, finding that a certain Renegotiation Agreement executed by the appellants' testator, Paul F. Vokal, deceased, and the plaintiff, is valid and enforceable; that appellants have no right to the recovery of moneys withheld by appellee thereunder, and that appellants be restrained from further prosecuting certain civil suits pending in the Superior Court of Los Angeles County, State of California, for the recovery of moneys from their debtors previously ordered withheld by appellee. The District Court

rendered judgment on Findings of Fact and Conclusions of Law.

Appellants' testator, and his defendant wife, resided at the time of the filing of the action, and continuously resided thereafter to the date of his death, within the jurisdiction of the District Court.

The District Court's jurisdiction rested on Section 41 (1) of Title 28 of the United States Code, and on Section 400 of Title 28, United States Code (now Sections 1331, 1345 and 2201 of Title 28 of the United States Code, entitled "Judicial Code and Judiciary") (Act of June 28, 1948, Chapter 646, Public Law 773, 80th Congress, Second Session).

And this Court has jurisdiction of this appeal under Sections 1291 and 1292(1), Chapter 83, Title 28 of United States Code, entitled "Judicial Code and Judiciary."

Statutes Involved.

The Renegotiation Act of 1943, being Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 (Public 528, 77th Congress) approved April 28, 1942; and as amended in full by Section 701(b) of the Revenue Act of 1943 (Public 235, 78th Congress), enacted February 25, 1944; 50 U. S. C. A. Section 1491.

And more particularly Sections 403(i) (1) (D); 403 (c)(6); 403(c)(4); 403(e)(1); 403(a)(4)(A); 403(a)(4)(B); 403(c)(2); 403(a)(9); 403(C)(1) and 403 (C)(3);

Chapters 1 and 2 E of the Internal Revenue Code;
and

Section 101(6) of the Internal Revenue Code;

Renegotiations Regulations Section 381.4;

Subsection 1, Section 8 of Article I of the Constitution of the United States;

Sections 1 and 2 of Article III of the Constitution of the United States;

Section 3806(a) Internal Revenue Code.

All of the above statutes are set forth in the appendix.

Government Rules and Regulations Involved.

Rules governing agents and Price Adjustment Sections of War Contracts Price Adjustment Board. [R. p. 27.]

“Government Contracts and Adjustments. Judge Advocate General’s School Text No. 12-219-Ann Arbor, Michigan.” [R. p. 27.]

Page 389(d) “Contractors subject to renegotiation. Any contractor, including a prime contractor or a subcontractor, receiving or accruing amounts from contracts with certain Government departments or agencies (or from subcontracts thereunder, or both) in an aggregate amount of \$500,000 or more during a fiscal year ending subsequent to 30 June 1943 is subject to renegotiation under the 1943 Act. . . . The contractor’s net receipts or accruals after renegotiation may not be reduced below the minimum sum of \$500,000. . . .”

P. 392(h) “Receipts from or accruals under a contract containing a renegotiation clause are not subject to renegotiation if the contractor did not receive or accrue the requisite \$500,000.”

P. 395 (d)(1) “The unilateral determination is limited to excessive profits contained in the total amounts received or accrued from renegotiable contracts during the fiscal year. . . .”

P. 398(f) "Treatment of federal income tax in renegotiation. . . . If the contractor filed its federal income tax return prior to the recapture of excessive profits, the contractor is given a credit against the amount of excessive profits to be refunded equal to the difference between the income tax which it actually paid for the period involved and the income tax for which it would have been liable had the profits to be recaptured not been included in its reported income when the return was filed."

P. 403(4) "Notwithstanding any other provision of the Act all costs allowable as deductions or exclusions under Chapters 1 and 2 E of the Internal Revenue Code, excluding taxes measured by income, are allowable as costs in renegotiation."

Note Below: "(91. Chapters 1 and 2 E, Internal Revenue Code, provide principally for deductions of normal business expenses.)"

P. 404 "The last named principle requires the allowance of any cost which is deductible for income tax purposes under the Internal Revenue Code. If it is impracticable to determine during renegotiation whether any cost is allowable" provision may be made for contingent allowance until it is determined by the Internal Revenue Bureau.

Renegotiation Regulations issued by War Contracts Price Adjustment Board for the year 1943, provide in Section 381.4 as follows: (Also reported in Vol. 2, Commerce Clearing House, p. 21,051 under "Government Contracts Reports" §30,141.) [R. 27.]

After the amount of renegotiable business of a contractor has been determined, it becomes necessary to determine the costs properly chargeable against the business

so as to ascertain the amount of profits derived therefrom. Section 403(a)(4)(B) (See Appendix A, p. 1) of the Renegotiation Act of 1943 defines "profits" as "the excess of the amount received or accrued . . . over the costs paid or incurred with respect thereto. . . ." The same section provides that "all items estimated to be allowable as deductions and exclusions under Chapters 1 and 2 E of the Internal Revenue Code (excluding taxes measured by income) shall, to the extent allocable to such contracts and subcontracts . . . be allowed as items of cost. . . ."

The method of accounting employed in determining the net income of a contractor or subcontractor for federal income tax purposes will be deemed the method of accounting used by him in keeping his books, unless the contractor or subcontractor and the Department conducting . . . agree upon some other method of accounting. The costs paid or incurred with respect to renegotiable contracts will be the costs allocated to such contracts by the contractors' cost accounting method if that method reflects recognized accounting principles and practice; otherwise costs will be determined in accordance with such method as in the opinion of the War Contracts Price Adjustment Board properly reflects such costs.

No item of cost allocable to renegotiable business will be allowed in an amount greater or less than that which is estimated to be deductible or excludible from income under Chapters 1 and 2 E of the Internal Revenue Code. In making such estimates due consideration will be given to any pertinent action by the Bureau of Internal Revenue, but such action need not be regarded as conclusive. Except in a few special cases when it is impossible for the

renegotiating agency to make a reasonable estimate as to whether a particular item of cost is allowable as a deduction or exclusion under the Internal Revenue Code, the estimate of the renegotiating agency will be final for the purposes of renegotiation. [R. p. 27.]

Statement of Case.

PROCEEDINGS.

On December 19, 1944, a Renegotiation Agreement, for the refund of \$38,442.26 of alleged excessive profits received by appellants' testator said Paul F. Vokal during the fiscal year 1943, was entered into by said Vokal and his wife with appellee. [R. pp. 9-15.]

On or about June 27, 1945, appellee's agents computed a tax credit under Section 3806 of the Internal Revenue Code of \$13,001.22 which appellee credited on said claim of alleged excessive profits. [R. pp. 4, 20.]

On or about July 13, 1945, in response to demands of appellee said Vokal paid \$11,136 to appellee under written protest. [R. p. 16.]

On October 5, 1945, pursuant to Section 403(c)(1) of said Renegotiation Act of 1943, appellants demanded, and, on or about October 23, 1945, they received, from appellee's agents their statement of "the facts and reasons" for the determinations made by said War Contracts Price Adjustment Board as to the amount of alleged excessive profits received by appellants' testator in 1943, which statement set forth the Board's method of arriving at said alleged profits. [R. p. 27.]

That appellants' testator, said Vokal, was a subcontractor, within the intent and purview of said Renegotia-

tion Act of 1943 [R. pp. 7, 17] as to some of his operations.

On November 15, 1945, appellee's agents issued withholding orders under Section 403(e)(2)(C) of the 1943 Renegotiation Act to Garrett Corporation and to California Institute of Technology, customers and debtors of said Vokal, which eventually resulted in withholding from appellant's testator Vokal sums aggregating \$11,899.04. [R. pp. 5-6, 16.]

On May 5, 1946, further withholding orders to Douglas Aircraft Company, Inc., resulted in withholding from said Vokal the sum of \$2,763.79; the total so withheld aggregating \$14,662.83, which added to the amount paid on account makes a total of \$25,798.83 collected by appellee from said Vokal. [R. pp. 6, 16.]

On December 22, 1945, said Vokal filed action numbered 508,756 in the Superior Court of Los Angeles County, California, to recover from Garrett Corporation the sum so withheld as aforesaid. [R. pp. 7, 29.]

On February 1, 1946, said Vokal filed action numbered 510,156 in the Superior Court of said County to recover from California Institute of Technology the sum so withheld as aforesaid. [R. pp. 7, 29.]

That counsel for appellee appeared as attorneys of record for said defendants Garrett Corporation and Douglas Aircraft Company, Inc., and filed demurrers to the complaints therein, which were on November 21, 1946, overruled. Thereafter said counsel filed answers therein, and said actions are now pending. [R. pp. 8, 29.]

On December 2, 1946, appellee brought the action in said United States District Court, resulting in the sum-

mary judgment from which this appeal is taken. [R. p. 2.] The issues involved in the last mentioned action were the same as those involved in said actions now pending in said Superior Court of Los Angeles County.

On December 20, 1948, the District Court granted Summary Judgment. [R. pp. 40-42.]

FACTS:

Appellee drafted said Renegotiation Agreement of December 19, 1944, and submitted the same to appellants' testator and his wife for execution by them. In the proceedings leading up to such execution, and in the actual contents and recitals therein contained appellee made false statements and representations to appellants' testator for the purpose of inducing him to enter into and execute said agreement. [R. pp. 17-22.]

That in truth and in fact appellee had no jurisdiction over appellants' testator in the matters incorporated in said agreement, nor was he in any wise subject to or within the scope of said Renegotiation Act of 1943. [R. pp. 22-23, 24, 19, 20.]

That appellee misrepresented the facts to appellants' testator and thereby induced him to execute said agreement in the following particulars [R. pp. 17-22]:

(Appellants' testator and his said wife will hereafter be termed "appellants.")

That appellee arbitrarily increased appellants' net income for the year 1943 from \$108,184.18 to \$156,055.55, an increase of \$47,871.37. This was an increase of \$47,671.37 in excess of the sum found by the Treasury Department's audit for said year. [R. pp. 19, 23.]

This arbitrary increase was accomplished in the following manner:

Appellants were entitled to the credit for and deductions from their gross receipts of the sum of \$22,888.88 disbursed by them during the year 1943 as and for ordinary and necessary expenses of the business and allowed by the Treasury Department, but which appellee denied to appellants in computing their profits. [R. pp. 19, 23.]

Appellee arbitrarily added the sum of \$45,162.58 to the gross sales by including certain work in process of appellants' for the year 1943, even though such work in process represented items of certain unfinished and uncompleted contracts, none of which was payable to or collectible by appellants, and none of which had accrued during said year 1943. [R. pp. 19, 23, 24.]

Appellee disallowed the amount of \$38,799.04 as the appellants' beginning inventory and added said amount to appellants' net income. [R. pp. 19, 23.]

That the net result of the foregoing adjustments made by appellee was to arbitrarily add to appellants' net income said sum of \$47,871.37, in excess of the amount found and determined by the Income Tax Bureau of the Treasury Department. [R. pp. 19, 23, 27.]

Appellee in computing offsetting tax credits allowable under Section 3806(b) of the Internal Revenue Code used an entirely different method and basis from that followed by the Bureau of Internal Revenue in computing appellants' income tax liabilities. [R. p. 20.]

Appellee included contracts and transactions had by appellants with the California Institute of Technology, which by the provisions of Section 403(i)(1)(D) of said Renegotiation Act of 1943 were exempt from renegotiation and should not have been included in appellants' gross or net income. [R. pp. 20, 24.]

Appellee computed and charged appellants with gross sales and receipts subject to renegotiation of \$538,442. [R. pp. 15, 18, 23, 20.] That the correct and true amount thereof after deducting \$65,576.50 of nonrenegotiable transactions therefrom, was only \$472,865.50, and appellants were in consequence exempt from all renegotiation in virtue of Section 403(c)(6) of said Renegotiation Act of 1943, and were not subject to the terms of said Act or to the jurisdiction of the War Contracts Price Adjustment Board. That subdivision (B) of said section explicitly excluded "the aggregate of the amounts received or accrued in such fiscal year by the . . . subcontractor and all persons under the control of . . . subcontractor, under contract with the Departments . . ." that did not exceed \$500,000. Appellee erroneously and incorrectly included the sum of \$65,576.50 which were in no wise subject to or within the purview of said Act. [R. p. 20.]

That appellee knew at the time of the execution of said agreement, or was charged with such knowledge, that appellants were exempt from renegotiation by the very terms of said Act. [R. pp. 17, 18, 22.]

The Summary Judgment of the District Court.

The Court adjudged:

A. That the Renegotiation Agreement dated December 19, 1944, for the refund of excessive profits is valid and enforceable.

B. That appellants have no interest in any amount withheld by the Garrett Corporation, California Institute of Technology, and Douglas Aircraft Company, Inc., pursuant to said withholding orders directed to said corporations by appellee.

C. That appellants have no right to the recovery by suit or otherwise to any of the amounts so withheld.

D. That appellants be restrained from further prosecuting the following suits in the Superior Court of Los Angeles County; Paul F. Vokal, plaintiff; California Institute of Technology, defendant; No. 510156; and Paul F. Vokal, plaintiff v. Garrett Corporation, defendant; No. 508756. [R. pp. 40-42.]

The District Court's Findings of Fact and Conclusions of Law.

FINDINGS OF FACT.

The Court found that there is no genuine issue of any material fact and that appellee is entitled to a summary judgment as a matter of law.

That the allegations set forth in paragraphs I, II, III, V, VI, VII and VIII of appellee's amended complaint were true.

That the tax credit to which appellants were entitled under Section 3806 of the Internal Revenue Code was \$13,001.22.

That appellants' testator failed to file in the Tax Court of the United States any petition for redetermination of the amount of excessive profits permitted by Section 403 (e)(1) of the Renegotiation Act (50 U. S. C. (App.), Sec. 1191(e)(1)).

That appellants have not pleaded or offered to prove any fraud or malfeasance or wilful misrepresentation inducing the execution of the contract.

That the first, third, fifth and sixth defenses alleged in the amended answer of the appellants to appellees amended complaint were insufficient as a matter of law and were thereby stricken upon the Court's own motion pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.

That the second and fourth defenses present cross-claims against the United States, each of which was for a sum in excess of \$10,000, on which the appellee had not consented to be sued in said Court, and that Court accordingly had no jurisdiction to render judgment on such cross-claim.

That all of the allegations set forth in appellants' amended answer inconsistent with the Findings of Fact were untrue. [R. pp. 36-38.]

CONCLUSIONS OF LAW.

That there exists no genuine issue as to any material fact involved in determining the right of recovery, and appellee was therefore entitled to judgment as prayed as a matter of law. [R. p. 39.]

Specification of Errors.

The District Court erred:

1. In its finding that there is no genuine issue as to any material fact, and that appellee was entitled to a summary judgment as a matter of law.

2. That each and all of the allegations set forth in paragraph VI of appellee's amended complaint are true.

3. That the tax credit to which appellants are entitled under Section 3806 of the Internal Revenue Code is limited to \$13,001.22.

4. That appellants' failure to file a petition in the Tax Court of the United States for redetermination of amount of alleged excessive profits pursuant to Section 403(e)(1) of the Renegotiation Act of 1943 (50 U. S. C. (App.) (e)(1)) was material, and the implied finding that appellants were in any wise bound to file such petition, or could have filed such petition in the circumstances in which appellants were placed.

5. That appellants did not plead or offer to prove fraud or malfeasance or wilful misrepresentation inducing the execution of the contract mentioned in appellee's complaint.

6. In striking the first, third, fifth and sixth defenses alleged in appellants' amended answer as insufficient as a matter of law.

7. That the District Court had no jurisdiction to render judgment for appellants on the second and fourth defenses set forth in the amended answer.

8. That each and all of the allegations set forth in appellants' amended answer inconsistent with the Findings of Fact were untrue.

In its conclusions of law:

1. That there exists no genuine issue as to any material fact involved in determining the right of recovery in this cause.

2. That appellee was entitled to judgment as prayed as matter of law.

In its judgment:

A. That said Renegotiation Agreement is valid and enforceable.

B. That appellants have no interest in any amount withheld by its said debtors pursuant to said withholding orders directed thereto by appellee's agents.

C. That appellants have no right to the recovery by suit or otherwise to any of the amounts so withheld.

D. That appellants be restrained from further prosecuting said actions in the Superior Court against their testator's debtors numbered 510156 and 508756. [R. pp. 32-34, 52-55.]

Points to Be Argued and Summary of Argument.

The appellee found its action and its claim to recovery on the Agreement of December 19, 1944, executed by the War Contracts Price Adjustment Board acting for appellee, and by appellants' testator and his wife. [R. pp. 9-15.] The authority to execute, and the terms of this agreement are wholly governed by the Renegotiation Act of 1943 (50 U. S. C. A. Section 1491 *et seq.*)

1. The power and jurisdiction of the War Contracts Price Adjustment Board was expressly limited by said Act to the *subject matter* of profits "received or accrued" "from contracts with the Departments and subcontracts which are determined in accordance with this section to be excessive" (Sec. 403(a)(4)(A)) (see Appendix A, p. 1), when derived *from contracts in excess of \$500,000 for the fiscal year 1943* (Sec. 403(c)(6)(B)) (see Appendix A, p. 4). The Board's jurisdiction of the *subject matter* could not be given or enlarged by the Board's assumption of power not conferred by statute, nor could the appellants waive such absence of jurisdiction of the subject matter by the execution of said agreement. Appellants contend the circumstances were such that the Board was without power or authority to execute such agreement, and that consequently the same is void and of no effect.

The authority of the Board was limited to and conditioned on:

(1) Profits received or accrued from contracts or subcontracts with the Departments of the Government, and

(2) To contracts in the aggregate exceeding \$500,000 for such fiscal year 1943.

The appellants alleged and are prepared to prove that the aggregate of such contracts for such year 1943 was less than \$472,865.50. That therefore the Board was without power or authority to execute said agreement, and appellee was consequently totally devoid of any right or power to take or withhold the money of these appellants, and that the same is now withheld without such right.

2. That said agreement is founded on false statements of facts and is void, in that it includes in appellants' receipts and income large sums of money not received or accrued by appellants, and omits and rejects legitimate, proper and necessary deductions for large sums paid for labor and materials during 1943.

That the recitals contained in said agreement are false and untrue in the following respects, to-wit:

a. The Board included in said agreement and in appellants' income certain work-in-process accounts amounting to \$45,162.58 which were contingent as to recovery, to which appellants had no unqualified and unconditional right to invoice or recover, were not amounts, income or profits received or accrued, were no part of the subject matter thereof. [R. p. 19.]

b. All transactions of appellants with the California Institute of Technology were exempt from renegotiation by the mandate of Section 403(i)(1)(D) of said statute of 1943, and 101(6) of the Internal Revenue Code. [R. p. 20; see Appendix C p. 9.]

c. The Board violated Section 403(a)(4)(B) of said statute and exceeded its jurisdiction when it arbitrarily denied appellants the right to deduct from their gross receipts the sum of \$22,888.88 which represented moneys

paid out in 1943 for ordinary and necessary expenses of the business. [R. pp. 19, 20, 21.]

d. The Board arbitrarily deducted \$39,799.04 from appellants' beginning inventory and added the same to appellants' net income. [R. pp. 19, 20.]

e. The Board arbitrarily set up \$38,442.26, the entire excess over the \$500,000 statutory exemption as excessive profits. [R. pp. 22, 23, 24.]

3. The unjust withholding of appellants' moneys amounted to fraud on appellants' rights, irrespective of whether there was actual fraud, or malfeasance as defined in Section 403(c)(4) of said Renegotiation Act of 1943. (See Appendix A p. 3.) (*Bull v. United States*, 295 U. S. 247, at page 260.)

4. Appellants contend that the District Court was in error when it restrained them from prosecuting said actions in the Superior Court of Los Angeles County against their debtors, for the reason that in the case of *Aircraft & Diesel Corporation v. Hirsch*, 331 U. S. 752, at page 775, the court held, that a suit by a subcontractor against the contractor was the proper remedy, and was not forbidden, either expressly or impliedly, by the Renegotiation Acts, nor were they dependent upon completion of the Tax Court proceedings, and that the contractor was expressly indemnified against such claims by Section 403(c)(2) of the 1943 Act. That the contractor stood as a stakeholder between the Government and the subcontractor.

POINT ONE.

The District Court Was in Error in Rendering Summary Judgment Against Defendants for the Reason That the Answer and Amended Answer Raised Several Genuine and Material Issues of Fact. A Summary Judgment Should Not Be Sustained Unless the Party's Right to Such Judgment Is Clear and There Is No Doubt as to the Solution of Any Essential Question. A Summary Judgment Was Not Intended to Function in a Case Which Is Involved or Complicated.

Doehler v. United States, 149 F. 2d 130 (2d Cir.), was an appeal from summary judgment. Reversed. At page 135(5, 6) the court said:

"We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial *where there is the slightest doubt as to the facts* and a denial of the right is reviewable; but refusal to grant a summary judgment is not reviewable. . . . But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. (Cf. *Arens v. United States*, 322 U. S. 419, 429, 433.) The District Courts would do well to note that time has often been lost by reversals of summary judgments improperly entered. *Sartor v. Arkansas National Gas Corp.*, 321 U. S. 620." (Cases cited. Emphasis added.)

Drittel v. Friedman, 60 Fed. Supp. 999 (affd. 154 F. 2d 653).

P. 1003, held that defendants by their answer raised issues which could only be settled by a trial, citing *Doehler v. U. S.*, 149 F. 2d 130, *supra*.

Gonzales v. Tuttmann (N .Y.), 59 Fed. Supp. 858, 861 (4), court held that the burden of establishing that no material issue of fact is present on the motion for summary judgment rests on the moving party.

P. 861(5) on a motion for summary judgment every doubt should be resolved against the moving party.

Toeberman v. Missouri-Kansas Pipe Line, 130 F. 2d 1016.

The moving party having failed to sustain its burden and hence a material issue of fact being present the motion for summary judgment must be denied.

American Optical Co. v. New Jersey Optical Co., 58 Fed. Supp. 601, 606(7-9), holds that Rule 56 Federal Rules Civil Procedure authorizes the court to enter summary judgment only if it appears that there is no general issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Under this rule the court's function is not to decide such factual issues, but to determine whether there is an issue of fact to be tried.

All doubts as to the existence of such issues are to be resolved against the moving party.

Fishman v. Teter (7 Cir.), 133 F. 2d 222:

A motion for summary judgment is not to be taken as a convenient substitute for a trial on the merits.

To the same effect is:

Barker v. Hoey, 33 Fed. Supp. 789, 801.

Tobleman v. Missouri-Kansas Pipe Line, 130 F. 2d 1016, holds that the court must look beyond the pleadings and determine whether there is a genuine issue of fact to be tried. To same effect is:

Griffith v. William Penn Broadcasting Co., 4 F. R. D. 475, 477(5, 6, 7);

Hawkins v. Frick-Reid Supply Corp., 154 F. 2d 88, 89(6).

Avrick v. Rockmont, 155 F. 2d 568, 571(5):

It is not the purpose of the rule to deprive litigants of their right to a full hearing on the merits if any real issue of fact is tendered.

Sartor v. Arkansas Natural Gas Corp., 321 U. S. 627;

Phoenix Hardware Co. v. Paragon Paint Corp., 1 F. R. D. 116, 118(4).

Lincoln Electric Co. v. Knox, 56 Fed. Supp. 308:

Action against Secretary of the Navy to enjoin enforcement of Renegotiation Act in its form prior to amendment of February 25, 1944, on ground that Act was unconstitutional. Motion by defendants for summary judgment denied.

Defendants contended that the court lacked jurisdiction because action was in legal effect against the United States, and that plaintiff had available adequate legal and administrative remedies.

Held that the injunction sought would simply prevent an officer of the United States from acting under an unconstitutional statute, if so found. Suit was not against the United States. *Ex parte Young*, 209 U. S. 123; *Philadelphia v. Stimson*, 223 U. S. 605; *Thompson v. Deal*, 92 F. 2d 478; *Ickes v. Fox*, 300 U. S. 82; *Power Co. v. T. V. A.*, 306 U. S. 118; *Lane v. Watts*, 234 U. S. 525; *Franklin v. Tugwell*, 85 F. 2d 208.

Id. p. 310. Plaintiff contended that Act as applied to the facts was void as being repugnant to Art. I, Sec. I, and Art. I, Sec. 8, and to Fifth and Tenth Amendments.

“Defendants contended that plaintiff had no other recourse than to challenge the claimed right of the government in the Tax Court or in the Court of Claims. We think this is not sufficient. In our opinion the case should be tried on the merits and plaintiff given the opportunity of proving its case, and the question of the constitutionality of the Act of Congress should be briefed and argued. *The rule for summary judgment was, in our opinion, never intended to throw upon the court the burden of determining a case involving, on the one hand, a delicate question of law and, on the other, complicated and controverted facts, without an adequate and proper hearing . . .* clearly plaintiff ought not to be stopped at the threshold of the court and told to seek relief in some other court and in some manner obviously inadequate and incomplete.” (Emphasis added.)

United States v. Charles (D. C. N. Y.), 1 F. R. D. 121:

Action by United States for determination of title to land. Motion for summary judgment denied, holding that there were genuine issues regarding facts material to the dispute.

Kent v. Hanlin, 30 Fed. Supp. 836, 837, holds that if answer raises a material issue of fact there is an insurmountable obstacle in the way of a summary judgment. Motion denied.

Tuolumne Gold Dredging Corp. v. Johnson (Cal. N. D.), 61 Fed. Supp. 62, 63: 1(1) Holds plaintiff is entitled to its day in court. It should have a trial so that judgment can be entered on the merits. Motion for summary judgment denied.

Parmelee v. Chicago Eye Shield Co., 157 F. 2d 582, 585(1-3):

Holds that Rule 56 Federal Rules Civil Procedure contemplates an inquiry in advance of trial as to whether there is a genuine issue and may be invoked for the purpose of striking sham claims and defenses. It can not be so applied as to deprive a litigant of his right to try any genuine issue by jury or otherwise. *Whitaker v. Coleman*, 115 F. 2d 305. *If the pleadings raise a genuine issue of fact, material to the dispute, a summary judgment should not be entered.* (*Nickelson v. Nestles Milk Products Corp.* (5 Cir.), 107 F. 2d 17.)

Id. p. 585(4, 5.) The Court should determine what material facts are in issue and what are not, and proceed with the trial as to facts actually in dispute.

The burden of proof is on moving party. *Walling v. Fairmont Creamery Co.* (8 Cir.), 139 F. 2d 318.

Id. p. 586(6, 7.) *Determination of defendants' demand by counterclaim in plaintiff's action rather than by independent action is favored.*

Id. p. 587(9, 10):

“ . . . The procedure is generally considered as a drastic remedy and strict compliance with the provisions of the rule is required. *A number of the District Courts have held that the existence of a counter-claim which presents a real issue prevents the granting of motion for summary judgment.* Standard Rolling Mills v. National Mineral Co., D. C. N. Y., 2 F. R. D. 236; Bolmer v. United States, D. C. N. Y., 26 Fed. Supp. 769. In the instant case, defendant denied that he was indebted to the plaintiff in any amount whatever, and alleged that by reason of the counter-claims defendant was entitled to recover of the plaintiff an amount far in excess of plaintiff's demand. This tendered an issue of fact. Before the adoption of the Federal Rules of Procedure a number of states had provisions for summary judgment, notably New York, Michigan, Illinois, and Connecticut. In New York it has been held that where a counter-claim is properly presented a summary judgment on plaintiff's claim may not be granted since the right to counter-claim is a substantial right which is to be protected. *Aetna Life Insurance Co. v. National Dry Dock & Repair Co.*, 230 App. Div. 486, 245 N. Y. Sup. 365; *Bank of U. S. v. Slifka*, 148 Misc. 60, 264 N. Y. Sup. 204.” (Emphasis added.)

Snouer v. United States, 140 F. 2d 367:

Page 369(1):

“Rule 56(c) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, provides that a motion for summary judgment shall be granted only if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact

and that the moving party is entitled to a judgment as a matter of law. Here, the complaint alleged that plaintiff had borne the burden of the taxes in question. This allegation was specifically denied by defendant's answer. Thus there is an issue of fact. That this fact was material can not be denied inasmuch as the statute—section 902 of the Revenue Act of 1936, 1947, 7 U. S. C. A. section 644—makes it a condition precedent to a refund that the claimant establish that he bore the burden of the tax. Because there was such an issue of fact presented by the pleadings, the motion for summary judgment should have been denied."

Plaintiff argued that the burden of taxes had been admitted.

Id. p. 371. Held, that it was clear the plaintiff's motion for summary judgment should not have been granted for the reason that the pleadings presented a material issue of fact. Reversed.

United States v. Kehoe (D. C. Penn.), 4 F. R. D. 306, 307, was a suit by the United States for the collection of taxes assessed by Commissioner of Internal Revenue. Defendant filed answer and plaintiff filed motion for summary judgment.

Page 307(2). Held, that United States was not entitled to summary judgment in suit for collection of taxes, where application of bar of statute of limitations to facts involved and liability of some of the other persons named in assessment presented substantial questions of fact. (3) "Courts should be reluctant to summarily preclude a defendant from a proper determination of the issues where any uncertainty of fact exists." Motion denied.

Purity Cheese Co. v. Ryser Co., 153 F. 2d 88, 89;

In considering a motion for summary judgment, the pleadings on which motion is based are to be liberally construed in favor of the party opposing the motion. Rules Civil Procedure, sec. 56(c). Federal Rules Civil Procedure 89(1, 2.) *Motion for summary judgment should be sustained only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law.*

In *State of Washington v. Maricopa County* (9 Cir.), 143 F. 2d 871, motion for summary judgment granted in District Court was reversed on appeal. Held, there were some genuine issues as to material facts.

Schenley Distributors v. Wisconsin Import Corporation, 28 Fed. Supp. 635, 637, involved motion for summary judgment. Held it must be denied where a genuine and substantial issue of fact is presented by the pleadings. *United States v. Curtis*, 147 F. 2d 639.

United States v. Clark (1947—D. C. Oregon), 72 Fed. Supp. 393, 394:

Suit involved renegotiation acts.

Page 394. Court holds War Contract Price Adjustment Board's Regulations are not binding on the courts.

"I have been struck by the type of legislation Congress adopted to recover excessive profits.

(4) "The War Contracts Price Adjustment Board makes a unilateral determination of the amount due as excessive profits and demands immediate payment. This is followed by suit in the District Court, to which

the contractor may not make a defense. He may not defend, because the Tax Court has been given exclusive jurisdiction to try his case *de novo*. The Tax Court's decision is final and not reviewable. Going into the Tax Court does not stay the case in the District Court. That case passes judgment summarily.

(5) "This is another variation of Yakus doctrine. *Yakus v. United States*, 321 U. S. 414. The power we in this country call 'the Government' can require the courts, state and federal, to reduce its claims to judgment and thereafter enforce them, without defenses being allowed.

"Why serve summons in this type of cases? What need is there to notify a defendant who cannot defend?

"How long this travesty of the judicial process is going to continue appears uncertain. The Supreme Court is plainly having difficulties with the statute, *Aircraft & Diesel Equipment Corporation v. Hirsch*, 67 S. Ct. 1493 (*supra*). The justice who wrote the opinion in the case wrote the dissenting opinion in the *Yakus* case. The fundamental questions arising under the two statutes are the same. The state courts have already resisted being used as vessels to pour things into."

In *Lincoln Electric Co. v. Knox*, 56 Fed. Supp. 368, involving one of the Renegotiation Acts, court denied defendant's motion for summary judgment.

Franklin v. Tugwell, 85 F. 2d 308.

POINT TWO.

The District Court Was in Error in Its Judgment Restraining the Appellants From Further Prosecuting the Two Suits in the Superior Court of Los Angeles County, Numbered 510,156 and 508,756 Respectively, Against Their Contractors.

Both of these actions were brought long prior to the bringing of the action at bar, and under the authority of *Aircraft & Diesel Corporation v. Hirsch*, 331 U. S. 752, appellants as subcontractors pursued the proper procedure to obtain a judicial determination of all the issues presented by the pleadings.

At page 775 of the *Aircraft* case, *supra*, Justice Rutledge, speaking for the court, said:

“In the first place, there can be no doubt of the availability or indeed the certainty and effectiveness of appellant’s remedy at law upon its contracts against its customers claimed to owe it money under these agreements. Suits of that character are not forbidden, either expressly or impliedly by the Renegotiation Acts. Nor are they made dependent upon completion of the Tax Court proceedings. (*Cf. American Federation of Labor v. Watson*, 327 U. S. 582, 589, . . .) Moreover we know of no reason why every question of constitutionality which has been raised in this suit could not be presented and determined in such a suit.

“In addition, there is special reason in the statutory provisions why that course should be followed rather than allowing the present suit. Appellant is, as we

have pointed out, a subcontractor, not a contractor with the Government. While its suit could be instituted directly only against the contractor with whom it had dealt, nevertheless it is hardly conceivable that the Government would permit the suit to go to final judgment without intervention by it, or, at the least, undertaking the responsibility for making the defense. For by Sec. 403(c)(2) it is expressly provided: 'Each contractor and subcontractor is hereby indemnified by the United States against all claims by any subcontractor on account of amounts withheld from such subcontractor pursuant to this paragraph.'

"In the face of this indemnity, the contractor becomes substantially a stakeholder as between the Government and the subcontractor, and the latter's suit against the contractor, if terminated favorably to the complainant, would obligate the Government to indemnify or reimburse the contractor for the liability thus incurred. In effect, the Government has consented to suit by the contractor in the Court of Claims on account of any liability the contractor incurs by virtue of lawful payment of the subcontractor's claim.

"Accordingly, there would seem to be no substantial reason for regarding the suit against the contractor as inherently inadequate or ineffective for the protection of any rights of appellant, including constitutional ones. In this respect the case stands identically with *Coffman v. Breeze Corporation*, *supra* (323 U. S. 316). If any such inadequacy exists it must be by virtue of factors extraneous to the nature of the suit itself and not present in the *Coffman* case"

Id. page 781:

"This case is perhaps even stronger than the *Waterman* case for application of the *Myers* rule. For here the appellant is as subcontractor retaining what the

contractor complainant did not have in the Waterman case, namely, a completely adequate remedy at law against its customers, buttressed by the Government's guaranty of indemnity to the contractor for all liability incurred by him on account of withholding funds allegedly due the appellant."

The appellants proceeded in precisely the manner approved above: They brought two actions in the Superior Court against their contractors to recover moneys withheld; the Government did not intervene, but it did defend, and the present suit in the District Court and this appeal are the direct result of those two original actions in the Superior Court.

In *Aircraft & Diesel v. Hirsch*, 62 Fed. Supp. 520, the same case, *supra*, before three judge statutory court, at page 524, the court granted defendants' motion to dismiss complaint and for summary judgment, *but without prejudice* "to the right of the plaintiff to maintain actions at law against its debtors and to bring suit as it may be advised in the Court of Claims."

At page 513(2) the Court held that equity had no jurisdiction for the reason that plaintiff had complete remedies by actions at law against parties indebted to it on contracts, and quoted from *Coffman v. Breese Corporation*, 323 U. S. 316;

At page 524, the Court further held that

"The Act of Congress involved in the Coffman Case is very similar to the Act in this case and there is

no reason why the plaintiff has not a complete and adequate remedy by suit against its customers for any sums that may be due from them . . . ;”

In *Coffman v. Breeze Corporation*, 323 U. S. 316, *supra*, at page 322, the Court held that a suit to recover a money judgment for the royalties from its customers would afford complete and adequate relief without resort to an equitable remedy, and that the constitutional validity of the Act would be a justiciable issue in the case.

In the case at Bar the appellants contend that the agents of the Government exceeded their powers and jurisdiction.

Notwithstanding the holdings of the foregoing authorities the District Court denied appellants their rights to proceed in suits against their customers in the Superior Court.

The pendency of the prior actions in the Los Angeles Superior Court between the same parties or their representatives, and in which the appellee's attorneys had appeared to defend, predicated on same cause, and growing out of the same transactions in which identical relief is sought, constitute good ground for the abatement of this suit by the Government in the District Court.

O'Reilly v. Curtis Publishing Co., 31 Fed. Supp. 364;

Hillgrove v. Wright, 146 F. 2d 621;

Joyce v. U. S., 48 Fed. Supp. 520;

Watson v. Jones, 13 Wall. 520;

U. S. v. Haytian Republic, 154 U. S. 118.

POINT THREE.

The District Court Was in Error in Holding That It Had No Jurisdiction to Render Judgment on Appellants' Cross-Claims and Offsets Numbered Second and Fourth in Their Answer.

Appellants Have the Right to Interpose Any Defenses They May Have Had to the Original Proceedings, Are Entitled to Such Affirmative Relief That May Be Pleaded and the Facts Warrant, and the Issues so Presented Are Justiciable Issues Within the Jurisdiction of the District Court to Determine.

In *United States v. The Thekla*, 266 U. S. 328, Mr. Justice Holmes, speaking for the Court, at page 339 said:

“We do not qualify the foregoing decisions in any way, but nevertheless are of the opinion that the District Court had power to enter a decree for damages. When the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case when but for its sovereignty it would be liable does not destroy the justice of the claim against it”

Continuing at page 341, the Court said:

“The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and on the other hand the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest. As has been said in other cases the question of damage to the colliding vessel necessarily arose

and it is reasonable for the court to proceed to the determination of all the questions legitimately involved, even when it results in a judgment for damages against the United States. The *Nuestra Senora de Regula*, 108 U. S. 92; The *Paquete Habana*, 189 U. S. 453, 465, 466. We gather that our opinion accords with the opinion of the English Courts. The *Newbattle*, 10 P. D. 33. It is said that there is no statute by which the Government accepted this liability. *It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act.*

“It follows . . . that interest and costs can be recovered from the Fleet Corporation. Interest was allowed against the United States in the *Neustra* . . . and the *Paquete* . . . *supra* and interest and costs by the judgment affirmed . . . *Porto Rico v. Ramos*, 232 U. S. 627.” (Emphasis added.)

In *United States v. Pusey* (9th Cir.), 47 F. 2d 22, this court passed on an action by the Government to recover the amount of estate tax which it had theretofore erroneously refunded. Defendants interposed a counterclaim based on the contention that the original levy was erroneous anyway. The Government contended that the counterclaim could not be set up. At page 23, the court said:

“There seems no good reason why the appellee (defendants) could not in this action present any defense they may have had to the original assessment”

Page 23(2):

“It is clear that the defense made here is nothing more nor less than an assertion that the original tax

is excessive by reason of the inclusion in the assets of the real property. This defense could have been interposed in an action brought by the government to collect the original tax. Or the tax could have been paid under protest and an action brought to recover."

In *United States v. U. S. Fidelity & Guaranty Co.*, 309 U. S. 506, 511, the court held that a defendant may without statutory authority recoup on a counterclaim an amount equal to the principal claim. Citing *Bull v. United States*, 295 U. S. 247, 260, 262-263.

Monongahela Rye, 141 F. 2d 864, 869, holds that when the United States institutes a suit it thereby submits itself to the jurisdiction of the court as to such adverse claims as have arisen out of the same transaction which gave rise to the sovereign's suit.

In *United States v. Shaw*, 309 U. S. 495, 501, the court held that cross-claims are allowed to the amount of the Government's claim when the Government voluntarily sues.

Tillbrook v. Forrestal, 65 Fed. Supp. 1, 2(2, 3), holds that, the United States being a party to the suit, afforded the plaintiff an opportunity to urge the invalidity of the Renegotiation Act and to argue that the Act did not apply to him because he had no privity of contract with the Navy Department,

"and to present any and all defenses he may have. This he may do in that action free from the jurisdictional difficulties which beset him here because the United States is not a party to this suit, and in the Renegotiation Act did not consent to be sued. By voluntarily entering the Pittsburgh forum, the United States opened wide to Tillbrook the gate of litigation."

Page 4:

“ . . . This opportunity to assert his rights was given in the fullest measure to the plaintiff when the United States filed its action at law against him.”

In *Bull v. United States*, 295 U. S. 247, Mr. Justice Roberts spoke for the court and said:

Page 260:

“In a proceeding for the collection of estate tax, the United States through a palpable mistake took more than it was entitled to. Retention of the money was against morality and conscience. But claim for refund or credit was not presented or action instituted for restitution within the period fixed by the statute of limitations.”

Subsequently the United States brought a proceeding for collection of the income tax arising out of the same transaction. The taxpayer opposed payment in full by demanding recoupment of the amount erroneously collected on the estate tax.

Continuing the Justice said (p. 260):

“Had the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent. *U. S. v. State Bank*, 96 U. S. 30. *While here the money was taken through mistake without any element of fraud, the unjust retention is immoral and amounts to a*

fraud on the taxpayer's rights. What was said in the State Bank case applies with equal force to this situation. *An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund. The form of the indebtedness or the mode in which it was incurred is immaterial. . . . In these cases (cited) and many others that might be cited, the rules of law applicable to individuals were applied to the United States.* A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, . . . but it may be used by way of recoupment and credit in an action by the United States arising out of the same transaction. (Cases cited.) In the latter case (U. S. v. Ringold, 8 Pet. 150, 163-164) this language was used: 'No direct suit can be maintained against the United States, but when an action is brought by the United States to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to Congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to Congress, except for the purpose of remedy. And no such necessity can exist, when this right can properly be set up by way of defense, to a suit by the United States.' If the claim for income tax deficiency had been the subject of a suit, any counter demand for recoupment of the overpayment of estate tax could have been asserted by way of defense and

credit obtained notwithstanding the statute of limitations had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action is timely." (Emphasis added.)

Further held, that the Government gave him right of credit for refund when it proceeded against him for collection of the income tax.

McVeigh v. United States, 78 U. S. 259, 267, 11 Wall. 259, 267, arose under the Act of 1862 making McVeigh an enemy rebel and under which his property was confiscated. The trial court struck out his answer. Reversed and remanded.

The court said at pages 266, 267:

"The order (of the lower court) in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization . . . It would be contrary to the first principles of the social compact and of the right administration of justice . . ."

POINT FOUR.

Appellants Alleged in Their Answer, but Were Denied the Opportunity to Prove, That Said Renegotiation Agreement of December 19, 1944 Was Null and Void for the Reason That the War Contracts Price Adjustment Board Exceeded Its Power and Jurisdiction and Thereby Bound Neither the Appellee nor the Appellants.

Said Board, the agent of the appellee, exceeded its jurisdiction in the following respects, to-wit:

1. Said Board was authorized to recapture only such excessive profits as were "received or accrued" during 1943 from such business as was renegotiable and not exempt. Section 403(a)(9), 403(a)(4)(B), 403(C)(1), and (3) and Section 403(c)(6); see Appendix A pp. 1 to 6 of the Renegotiation Act of 1943 (50 U. S. C. A. sec. 1941).

Appellants alleged but were denied the right to prove that their total renegotiable contracts and purchase orders were less than the statutory exemption of \$500,000 granted by section 403(c)(6) of said Act. [R. pp. 19, 20, 22.]

By the express terms of said Act excessive profits could only be computed out of "profits received or accrued" during 1943 from renegotiable contracts in excess of said \$500,000 exemption. The appellee's jurisdiction was expressly limited to such profits. Appellants were therefore exempt from all renegotiation whatsoever, and they were consequently not subject to the jurisdiction of said Board or of appellee's agents. (Sec. 403(c)(6).) All the Board's withholding orders herein are void, and the execution of said agreement constitutes no grounds for the retention of said money. The Board could neither accept nor receive

money which it was without power or authority in the first instance to recapture. It had no authority to execute said agreement.

Bancroft v. Thayer, 2 Fed. Cas. 580, 582;

Scheer v. Moody, 48 F. 2d 327, 66 F. 2d 999;

Whiteside v. U. S., 93 U. S. 247;

Hale County v. American Indemnity Co., 63 F. 2d 275;

Anthony v. County of Jasper, 101 U. S. 393, 698;

United States v. Continental Casualty Co., 29 Fed. Supp. 598, 113 F. 2d 284;

Hawkins v. United States, 96 U. S. 689, 691;

Spaulding v. Douglas Aircraft Co., 154 F. 2d 419, 422.

The Board's jurisdiction over such "profits received or accrued"—the subject matter of the Act and of said Agreement—could not be given, enlarged, or waived by the parties hereto by the mere execution of said agreement, or by any other means, nor could it be enlarged by the appellee by usurpation or assumption of powers not granted in the first instance.

Pinkerton Natl. Detective Agency v. Fidelity & Deposit Co., 138 F. 2d 469, 472(3,4) (certiorari denied 321 U. S. 766);

United States v. Johnson, 53 Fed. Supp. 167, 170(2, 4);

United States v. Mott, 37 F. 2d 850, 862(a);

Harrington v. Superior Court, 194 Cal. 185, 188;

General Broadcasting System v. Bridgeport Broadcasting System, 53 F. 2d 664, 668(6, 7);

Cox v. United States (9th Cir.), 157 F. 2d 787, 789(4, 5);

Alton Water Co. v. Illinois Commerce Commission, 279 Fed. 869;

Bachus-Brooks Co. v. Northern Pac. Co., 21 F. 2d 4 (certiorari denied 275 U. S. 562);

School of Magnetic Healing v. McAnnulty, 187 U. S. 94;

Social Security Board v. Nierotko, 327 U. S. 358.

In *Child v. Adams* (5 F. C. 613), Fed. Cases No. 2,673, page 615, the court said:

“Where a statute defines the extent of power given to one who acts ministerially, the courts can not extend it, or validate acts done without or beyond its authority.”

In *Moss v. United States*, 103 F. 2d 395, at page 397, the court held:

“ . . . There can be no question but that courts must exercise the judicial power vested in them to determine the legal validity of administrative action, where the validity of such action is involved in questions properly before them, whether they have been granted the right of review over action of the administrative agency or not. The duty necessarily arises because of their obligations to decide cases before them according to law.”

Federal Trade Commission v. Raladam Co., 283 U. S. 643, 644.

Walling v. La Belle S. S. Co., 148 F. 2d 198, 201(4, 5), holds that jurisdiction is essential to give valadity to the determination of an administrative authority, and *that without jurisdiction their acts are void, and open to collateral attack.*

The Renegotiation Act enumerated the conditions and thereby excluded all subcontractors from its application who did not come within its terms.

Gegiow v. Uhl, 239 U. S. 3, 9.

2. Said Board included in appellants' income the receipts from California Institute of Technology, which by the express terms of section 403(i)(1)(D) of said Act and of section 101(6) of the Internal Revenue Code were wholly exempt from Renegotiation. [R. p. 20.]

3. Said Board included in appellants' receipts certain "Work in Process" accounts aggregating over \$45,162.50 which had not accrued at the end of said fiscal year 1943, in that appellants had no fixed and unconditional right to receive or collect thereon, and there was no fixed and ascertainable liability of the vendees, and they were in no sense a part of appellants' receipts, gross or otherwise. [R. p. 19.]

Liebes & Company v. Commissioner of Internal Revenue (9th Cir.), 90 F. 2d 932, 936, 937;

Guaranty Trust Co. v. Commissioner, 303 U. S. 493, 498;

Franklin County Distilling Co. v. Commissioner, 125 F. 2d 800, 805;

- Ohmer Register Company v. Commissioner*, 131 F. 2d 682, 686;
- Rice, Barton & Files, Inc. v. Commissioner*, 41 F. 2d 339, 340, 341;
- Webb-Press Co. v. Commissioner*, 3 B. T. A. 247 253; 9 B. T. A. 236;
- Ehret-Day Company*, 2 Tax Ct. 25;
- Helvering v. Russian Finance Co.*, 77 F. 2d 325, 327, 328(10);
- Security Mills v. Commissioner*, 321 U. S. 281, 286;
- Lucas v. North Texas Lumber Company*, 281 U. S. 11;
- D D Oil Company v. Commissioner*, 147 F. 2d 936, 938;
- Commissioner v. Blaine, Mackay, Lee Company*, 141 F. 2d 201;
- Case v. Commissioner*, 103 F. 2d 283, 288;
- U. S. v. Christine Oil Co.*, 269 Fed. 458;
- Commissioner v. Union Pac. Ry. Co.*, 86 F. 2d 637, 639.

The foregoing authorities support appellants' contention that such work in process accounts were not and could not be income or "profits received or accrued" in such year 1943, and consequently the Board had no jurisdiction thereover.

Appellants alleged in their answer that they had no right to bill or invoice these accounts in 1943, and they therefore had no unconditional and unqualified right to recover the same. [R. pp. 19, 20.]

The Work in Process Accounts being contingent as to recovery thereon were not income or profits, and had no ascertainable market value during 1943.

Cassatt v. Commissioner, 137 F. 2d 745, 748(2, 3).

4. The Board violated section 403(a)(4)(B) of said Act when it arbitrarily denied appellants the right to deduct from their gross receipts the sum of \$22,888.88 which was the amount paid out during 1943 for ordinary and necessary expenses of the business. The Board was required to allow appellants the same deductions from their gross receipts as they were allowed when computing their income tax liabilities. Appellants were required by section 23(a) of the Internal Revenue Code to deduct the same in the year that they were expended. [R. p. 19.]

Helvering v. Russian Finance Co., 77 F. 2d 324, 327, 328(10);

Chaplin v. Commissioner, 132 F. 2d 298 (9th Cir.);

Grays Harbor Motorship Corp. v. U. S., 45 F. 2d 259;

Security Mills v. Commissioner, 321 U. S. 281, 286;

Helvering v. Kansas City Amer. Ass'n. Baseball Club, 75 F. 2d 600, 602, 604;

Commissioner v. Thatcher, 75 F. 2d 900.

The rejection by said Board of the deduction of this item of \$22,888.88 from appellants' gross income had the effect of adding an equal amount to their receipts.

In *Atkinson v. New Britain Machine Co.*, 154 F. 2d 895, at page 894, the court defined "excessive profits" in these words:

" . . . As we understand excess profits subject to renegotiation are those profits in excess of the

legitimate costs incurred in production plus a normal profit, all of which are to be determined in accordance with designated formulas”

Dixies Pine Products Co. v. Commissioner, 320 U. S. 516, 519;

Commissioner v. Blaine, Mackay Co., 141 F. 2d 201, 203(2, 3);

Burnet v. Sanford & Brooks, 282 U. S. 359, 363, 364, 365;

Gallatin Farmers Co. v. Commissioner (9th Cir.), 132 F. 2d 706, 709(4);

U. S. v. Tillinghast, 55 F. 2d 279;

American Hotels Corp. v. Commissioner, 15 F. 2d 817.

Appellee’s agent, the War Contracts Price Adjustment Board, disregarded Judge Advocate General’s Text No. 12-219, which provided as follows, page 403(4):

“Notwithstanding any other provisions of the Act (Renegotiation Act of 1943), all costs allowable as deductions or exclusions under Chapters 1 and 2 E of the Internal Revenue Code, excluding taxes measured by income, are allowable as costs in renegotiation.” N. B. “Chapters 1 and 2 E, Internal Revenue Code, provide principally for the deduction of normal business expenses.”

The Board was bound to allow the appellants the same deductions from their gross income for operating costs and expenses as they were allowed in computing their net income and liabilities.

Section 403(a)(4)(2) of said Act provided *inter alia*, that

“ . . . all items estimated to be allowable deductions under Chapters 1 and 2 E of the Internal Revenue Code (excluding taxes measured by income) shall to the extent allocable to such contracts and sub-contracts (. . .) be allowed as items of cost . . . ”

Renegotiation Regulations, Section 381.4;

Judge Advocate General's School Text No. 12-219,
“Government Contracts and Adjustments,” pages
389(d), 392(h), 395(a)1, 398(f), 403(4), 404
(*supra*, pp. 3 and 4);

Liebes & Co. v. Commissioner (9th Cir.), 90 F.
2d 932, 938;

Olmer Register Co. v. Commissioner, 131 F. 2d
682, 686(2)(3);

Rice, Barton & Fales, Inc. v. Commissioner, 41 F.
2d 389, 341;

Webb-Press Co. v. Commissioner, 3 B. T. A. 247,
253;

Ehret-Day Co., 2 Tax Ct. 25;

Case v. Commissioner, 103 F. 2d 283, 286;

Commissioner v. Blaine, Mackay, Lee Co., 141 F.
2d 201, 203(3, 3);

Burnet v. Sanford & Brooks, 282 U. S. 359, 364;

Athens Roller Mills v. Commissioner, 136 F. 2d
125, 128.

5. The Board violated said statute when it arbitrarily deducted \$39,799.04 from appellants' beginning inventory and added same to their net income. [R. p. 19.]

6. The Board violated said statute when it arbitrarily set up \$38,442.26, the entire amount alleged by the Board to be in excess over the statutory exemption as excessive profits. Such application of section 403(a)(6) of said Act was repugnant to subsection 1 of Section 8 of Article I of the United States Constitution, and to the Fifth Amendment thereof, thereby taking appellants' property without due process of law and without just compensation. In determining appellants' gross receipts and their net income the Board arbitrarily drew items both from the years 1942 and 1944 transactions. This was contrary to law.

Athens Roller Mills v. Commissioner 136 F. 2d 125, 148;

Burnet v. Sanford & Brooks, 282 U. S. 359, 363-365.

7. That said Renegotiation Agreement is founded on false statements of material facts, in that it includes in appellants' income or receipts large sums of money not received or accrued, and omits necessary and proper deductions for large sums paid for labor and materials during 1943, it thereby appearing that the subject matter thereof is not supported by the truth or facts, and is not within the purview of the Act.

S. E. C. v. Chenery Corporation, 318 U. S. 80, 87;

Bancroft v. Thayer, Fed. Cases No. 835, 2 Fed. Cas. 580, 582;

Scheer v. Moody, 48 F. 2d 327, 331, 66 F. 2d 999;

Anthony v. County of Jasper, 101 U. S. 693, 698.

POINT FIVE.

The District Court Found That Appellants' Testator Did Not Plead or Offer to Prove Any Fraud or Malfeasance or Wilful Misrepresentations Inducing the Execution of Said Renegotiation Agreement. This Is Manifestly in Error as Their First Separate Affirmative Defense [R. pp. 17-22] Pleads Specifically and in Detail the Frauds, Misrepresentations and Malfeasance of Appellee's Agents Inducing Their Testator to Execute Said Instrument.

The appellee's collection and retention of moneys from appellants without right or authority in itself amounts to fraud on appellants as is expressly held in the case of *Bull v. United States*, 295 U. S. 247 at page 260, and so held even though the claim for refund, recoupment and counterclaim had not been presented or action instituted within the period fixed by the statute of limitations. The court held that when an action is brought by the United States a claim for recovery by the defendant may be used by way of recoupment and credit arising out of the same transaction.

United States v. Pusey (9th Cir.), 47 F. 2d 22, 23, *supra*, to the same effect.

Appellee obviously relies on paragraph 8 of said Renegotiation Agreement on Section 403(c)(4) of said Renegotiation Act (see Appendix A p. 3), which attempted to limit and circumscribe the inherent and constitutional powers of the court to review the action of the Board. These are plainly contrary to public policy and are repugnant to Article III of the Constitution of the United States. The United States District Court is a constitu-

tional court and may not be thus restricted or its powers abridged.

This court may, and appellants contend that it should, set aside said agreement on any grounds and for any cause that appellants establish on the trial. Said agreement may be annuled for constructive fraud, implied fraud, actual fraud, mistake of law or fact, mutual mistake, failure or absence of consideration, absence of jurisdiction by appellee's agents, absence of mutuality, and on any other legal or equitable grounds, normally within the powers of the District or this Court.

St. Joseph Stockyards v. United States, 298 U. S. 38, 52, wherein Mr. Chief Justice Hughes said:

“Under our system there is no warrant for the view that the judicial powers of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of independent judicial judgment upon the facts where confiscation is alleged. . . .”

A leading case on the subject is that of *Crowell v. Benson*, 285 U. S. 22 (affirming 33 F. 2d 137, 45 F. 2d 66), the Chief Justice again speaking for the court at page 48(2):

“The contention based upon the judicial power of the United States, as extended ‘to all cases of admiralty and maritime jurisdiction,’ (Const. Article III) presents a distinct question. In *Murray’s Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 284, this court, speaking through Mr. Justice Curtis, said: ‘To avoid misconstruction upon so

grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination.’ ”

Id. p. 56:

“The question was whether the Congress may substitute for the constitutional courts in which the judicial power of the United States is vested, an administrative agency—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use and that the Congress could completely oust the courts of all determination of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, whereby fundamental rights depends, as not infrequently they do depend upon the facts, and finality as to facts becomes in effect finality in law.”

Id. p. 59. The Court held that matters disclosing a want of jurisdiction may be considered by a court of law.

Id. p. 60. In cases brought to enforce constitutional rights, the judicial power necessarily extends to the inde-

pendent determination of all questions both of fact and of law, necessary to the performance of that supreme function.

Id. p. 63. The question in the instant case was whether the commissioner acted in a case to which the statute was inapplicable.

Id. p. 64. If the court is satisfied that the commissioner had no jurisdiction that determination will deprive him of effectiveness for any purpose. Held, that the court should determine such an issue on its own record and facts elicited before it.

In re Atcheson, 284 Fed. 604, involved violation of court order made under Clayton Act, which provided that one charged with contempt could have a jury trial. P. 606(1) Held that power to punish for contempt was inherent, and not dependent on legislation. The Court then cited Sections 1 and 2 of Article III of the U. S. Constitution, referred to *Martin v. Hunter's Lessee*, 1 Wheat. 331, 4 L. Ed. 97, and said:

“The language used by Mr. Justice Story . . . in discussing this third article, seems to me to set at rest any question that the inferior courts to be ordained and established were the creatures of Congress subject to have the rights of such courts inherent, when so ordained and established, abridged, or taken away.”

Estep v. United States, 327 U. S. 114, p. 119, holding that judicial review may be required by the Constitution, and at page 126, Mr. Justice Murphy in his concurring opinion held that if the Act precluded the courts from inquiring into the validity of an inductive order it was unconstitutional.

Hall v. White, Collector I. R., 48 F. 2d 1060, and *Schlesinger v. Wisconsin*, 270 U. S. 230, hold that mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property.

53 F. 2d 210.

In *Stark v. Wickard*, 321 U. S. 288, Mr. Justice Reed, speaking for the Court said:

“ . . . When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. (N. B. 22.) This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and making their jurisdiction. Cf. *U. S. v. Morgan*, 307 U. S. 183, 190, 191 . . . under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.”

Manley v. Georgia, 279 U. S. 1;

The St. Lawrence, 66 U. S. 522, 527.

Winston v. Georgia, 34 F. 2d 163, 167, holds that the equitable jurisdiction of a federal court is derived from the Constitution, and cannot be limited either by state statutes or Acts of Congress, but follows and grants relief in those

cases in which equitable jurisdiction obtained at the time the Constitution was adopted.

Persons v. Detroit & Canada Tunnel Co., 15 Fed. Supp. 986, 996(8, 9);

A. P. W. Paper Co. v. Riley, Commissioner, 12 Fed. Supp. 738, 741(1), 742;

Michaelson v. United States, 266 U. S. 42, 44.

United States v. Bateman, 278 Fed. 231, 232, holds as to the Fourth Amendment that the question as to an unreasonable search and seizure is a judicial question.

Utah Fuel Co. v. Coal Commission, 306 U. S. 56, 60, that jurisdiction of a District Court is to be determined by the allegations in the bill.

Crowell v. Benson, 33 F. 2d 137 (affd. 285 U. S. 22), 139, holds that the investment of judicial power came from the Constitution and not from Congress, and that courts established under Section 2 of Article III are Constitutional Courts, and same case 38 F. 2d 306, 308, holds that Congress has no power to dictate to a constitutional court what its findings shall be where jurisdiction is conferred by Article III, affd. 45 F. 2d 66.

Radio Commission v. Nelson Bros., 289 U. S. 266, holds that it is for the court to determine whether the commission acts within its power or goes beyond it.

United States v. Mott, 37 F. 2d 860 (affd. 283 U. S. 747), p. 862(3);

Garfield v. Goldsby, 211 U. S. 249.

POINT SIX.

The District Court Found That Appellants Failed to File in the Tax Court of the United States Their Petition for Redetermination of the Amount of Excessive Profits as Permitted by Section 403(e)(1) of Said Act (50 U. S. C. (App.) 1191(e)(1). Appellants Were Not Required so to Do Inasmuch as They Assail the Jurisdiction of the War Contracts Price Adjustment Board. Appellants Were Not Required in the Circumstances to Exhaust Their Administrative Remedies. They Are Entitled to Raise the Question of Jurisdiction at Any Time.

Aircraft & Diesel Corporation v. Hirsch, 331 U. S. 752, wherein at page 775, the court held that appellants' suits against its customers are not forbidden by the Renegotiation Acts, nor are they made dependent upon completion of Tax Court proceedings.

Skinner & Eddy Corporation v. United States, 249 U. S. 557, was a suit to enjoin the I. C. C. from increasing certain freight rates. Mr. Justice Brandeis, speaking for the Court at page 562, said that the defendants contended that the District Court had no jurisdiction of the subject matter because the order of the Commission could not be assailed in the courts until after a remedy had been sought under the Act to Regulate Commerce. Held, that these contentions proceeded upon a misrepresentation of plaintiff's position. Plaintiff was not seeking relief against a rate or practice alleged to be unjust because unreasonably high or discriminatory, but that plaintiff contended the Commission had exceeded its powers and that the order was therefore void. "In such a case the courts have jurisdiction of suits to enjoin the enforcement of an order, even

if the plaintiff has not attempted to secure redress in a proceeding before the commission.” (*I. C. C. v. Diffebaugh*, 222 U. S. 42, 49 (cases cited)). Held that the District Court had jurisdiction.

Ogden City v. Armstrong, 168 U. S. 224, 240, involved a city tax. The city contended that defendants could not recover taxes paid by them because they must proceed under the state statute. Held, that where the city council had no jurisdiction to levy the tax, the taxpayer need not proceed under the statute to recover. That where the tax was wholly void and illegal, as in this case, the statute and its remedies for errors and irregularities had no application.

A recent case is that of *Varney v. Warehime*, 145 F. 2d 238 (certiorari denied 325 U. S. 882, and rehearing denied 326 U. S. 805) 243(8) appellants insisted that action was brought prematurely because appellees had not exhausted their remedies under the procedural regulations of the Director of Food Distribution.

Held, that this is not an “ironclad rule and has no application when the defect urged goes to the jurisdiction of the administrative remedy.”

Further held at page 244(9) that where the action was based on the claim that the War Food Administration had no authority to promulgate the order providing for assessment of cost of supervision against milk handlers, plaintiffs were not required to resort to regulations issued by the Administrator for correcting the irregularities, if any, before bringing the action.

Fosgate v. Kirkland, 19 Fed. Supp. 152, 156(4, 5) holds that existence of administrative remedy in AAA did not preclude citrus handlers from maintaining suit to enjoin

enforcement order issued by Secretary of Agriculture. That attacks upon the validity of the Act and the order of the Secretary were not administrative questions, but were questions of law.

Id. page 157(8, 9): That regulations vesting in the Secretary power to determine controversies were an encroachment upon the judicial branch of government as defined by Article III.

O'Donoghue v. U. S., 289 U. S. 516.

We respectfully submit that the District Court erred both in its findings of fact and conclusions of law, and that its judgment should be reversed.

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Attorneys for Appellants.

APPENDIX A.

The Renegotiation Act of 1943, being Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942 (Public 528, 77th Congress) approved April 28, 1942; and as amended in full by Section 701(b) of the Revenue Act of 1943 (Public 235, 78th Congress), enacted February 25, 1944; 50 U. S. C. A. Section 1491.

Sec. 403(a). (4) (A) The term "excessive profits" means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this section to be excessive.

* * * * *

Sec. 403(a). (4) (B) The term "profits derived from contracts with the Departments and subcontracts" means the excess of the amount *received or accrued* under such contracts and subcontracts over the costs paid or incurred with respect thereto. Such costs shall be determined in accordance with the method of cost accounting regularly employed by the contractor in keeping his books, but if no such method of cost accounting has been employed, or if the method so employed does not, in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States properly reflect such costs, such costs shall be determined in accordance with such method as in the opinion of the Board or, upon redetermination, in the opinion of The Tax Court of the United States does properly reflect such costs. Irrespective of the method employed or prescribed for determining such costs, no item of cost shall be charged to any contract with a Department or subcontract or used in any manner for the purpose of determining such cost, to the extent that in the opinion of

the Board or, upon redetermination, in the opinion of The Tax Court of the United States, such item is unreasonable or not properly chargeable to such contract or subcontract. Notwithstanding any other provisions of this section, all items estimated to be allowable as deductions and exclusions under Chapters 1 and 2 E of the Internal Revenue Code (excluding taxes measured by income) shall, to the extent allocable to such contracts and subcontracts (or, in the case of the recomputation of the amortization deduction, allocable to contracts with the Departments and subcontracts), be allowed as items of cost, but in determining the amount of excessive profits to be eliminated proper adjustment shall be made on account of the taxes so excluded, other than Federal taxes, which are attributable to the portion of the profits which are not excessive. (Emphasis added.)

* * * * *

Sec. 403(a). (9) The terms "*received or accrued*" and "paid or incurred" shall be construed according to the method of accounting employed by the contractor or subcontractor in keeping his books. (Emphasis added.)

* * * * *

Sec. 403(c). (1) Whenever, in the opinion of the Board, the amounts *received or accrued* under contracts with the Departments and subcontracts may reflect excessive profits, the Board shall give to the contractor or subcontractor, as the case may be, reasonable notice of the time and place of a conference to be held with respect thereto. (Emphasis added.)

* * * * *

Sec. 403 (c). (3) No proceeding to determine the amount of excessive profits shall be commenced more than one year after the close of the fiscal year in which such excessive profits were *received or accrued*, or more than one year after the statement required under paragraph (5) is filed with the Board, whichever is the later, and if such proceeding is not so commenced, then upon the expiration of one year following the close of such fiscal year, or one year following the date upon which such statement is so filed, whichever is the later, all liabilities of the contractor or subcontractor for excessive profits *received or accrued* during such fiscal year shall thereupon be discharged. If an agreement or order determining the amount of excessive profits is not made within one year following the commencement of the renegotiation proceeding, then upon the expiration of such one year all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged, except that (A) if an order is made within such one year by the Secretary (or an officer or agency designated by the Secretary) pursuant to a delegation of authority under subsection (d) (4), such one-year limitation shall not apply to review of such order by the Board, and (B) such one-year period may be extended by mutual agreement. (Emphasis added.)

Sec. 403(c). (4) For the purposes of this section the Board may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may contain such terms and conditions as the Board deems advisable. Any such agreement shall be conclusive according to its

terms; and except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact, (A) such agreement shall not for the purposes of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.

* * * * * * * * *

Sec. 403(c). (6) This subsection shall be applicable to all contracts and subcontracts, to the extent of amounts *received or accrued* thereunder in any fiscal year ending after June 30, 1943, whether such contracts or subcontracts were made on, prior to, or after the date of the enactment of the Revenue Act of 1943, and whether or not such contracts or subcontracts contain the provisions required under subsection (b), unless (A) the contract or subcontract provides otherwise pursuant to subsection (i), or is exempted under subsection (i), or (B) the aggregate of the amounts received or accrued in such fiscal year by the contractor or subcontractor and all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts (including those described in clause (A), but excluding subcontracts described in subsection (a) (5) ((B)) *do not exceed \$500,000 and under subcontracts described in subsection (a) (5) (B) do not exceed \$25,000*

for such fiscal year. If such fiscal year is a fractional part of twelve months, the \$500,000 amount and the \$25,000 amount shall be reduced to the same fractional part thereof for the purposes of this paragraph. (Emphasis added.)

* * * * *

Sec. 403(e). (1) Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits *received or accrued* by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits *received or accrued* by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. For the purposes of this subsection the court shall have the same powers and duties, in so far as applicable, in respect of the contractor, the subcontractor, the Board and the Secretary, and in respect of the

attendance of witnesses and the production of papers, notice of hearings, hearings before divisions, review by the Tax Court of decisions of divisions, stenographic reporting, and reports of proceedings, as such court has under sections 1110, 1111, 1113, 1114, 1115 (a), 1116, 1117 (a), 1118, 1120, and 1121 of the Internal Revenue Code in the case of a proceeding to redetermine a deficiency. In the case of any witness for the Board or Secretary, the fees and mileage, and the expenses of taking any deposition shall be paid out of appropriations of the Board or Department available for that purpose, and in the case of any other witnesses, shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this subsection shall not operate to stay the execution of the order of the Board under subsection (c) (2).

* * * * *

Sec. 403(i). (D) any contract or subcontract with an organization exempt from taxation under section 101 (6) of the Internal Revenue Code; or

APPENDIX B.

SECTION 3806 OF THE INTERNAL REVENUE CODE (As Amended)

Section 3806 of the Internal Revenue Code (as Amended by Section 701 (c) of the Revenue Act of 1943), Sec. 3806. Mitigation of Effect of Renegotiation of War Contracts or Disallowance of Reimbursement.

Sec. 3806(a). Reduction for Prior Taxable Year.—

(1) Excessive Profits Eliminated for Prior Taxable Year.—In the case of a contract with the United States or any agency thereof, or any subcontract thereunder, which is made by the taxpayer, if a renegotiation is made in respect of such contract or subcontract and an amount of excessive profits *received or accrued* under such contract or subcontract for a taxable year (hereinafter referred to as “prior taxable year”) is eliminated and, in a taxable year ending after December 31, 1941, the taxpayer is required to pay or repay to the United States or any agency thereof the amount of excessive profits eliminated or the amount of excessive profits eliminated is applied as an offset against other amounts due the taxpayer, the part of the contract or subcontract price which was received or was accrued for the prior taxable year shall be reduced by the amount of excessive profits eliminated. For the purposes of this section—

(A) The term “renegotiation” includes any transaction which is a renegotiation within the meaning of Section

403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.) or such section, as amended, any modification of one or more contracts with the United States or any agency thereof, and any agreement with the United States or any agency thereof in respect of one or more such contracts or subcontracts thereunder.

(B) The term “excessive profits” includes any amount which constitutes excessive profits within the meaning assigned to such term by subsection (a) of Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), as amended, any part of the contract price of a contract with the United States or any agency thereof, any part of the subcontract price of a subcontract under such a contract, and any profits derived from one or more such contracts or subcontracts. (Emphasis added.)

(C) The term “subcontract” includes any purchase order or agreement which is a subcontract within the meaning assigned to such term by subsection (a) of Section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), as amended.

APPENDIX C.

Title 26 Section 101 Subchapter C (Section 101(6) of the Internal Revenue Code):

Section 101 "The following organizations shall be exempt from taxation under this Chapter:

"(6) Corporations, and any Community Chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or, . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation; . . ."

No. 12209.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FREDA MARY VOKAL, CHARLES DAVISON, and ROMEYN
B. SAMMONS, Executors of the Estate of Paul F. Vokal,
Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

JAMES M. CARTER,
United States Attorney,

ERNEST A. TOLIN,
Chief Assistant United States Attorney,

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JUL 29 1949

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B. SAMMONS, Executors of the Estate of Paul F. Vokal,
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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

Jurisdiction of this Court is established by Title 28, United States Code, Section 400, Title 28, United States Code, Section 41(1), and by the provisions of Section 403(c) of the Renegotiation Act.

Statute.

Section 403(c)(4) of the Renegotiation Act of 1943 provides as follows:

“(4) For the purposes of this section the Board may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may contain such terms and conditions as the Board deems advisable. *Any such agreement shall be con-*

clusive according to its terms; and except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact; (A) such agreement shall not for the purposes of this section be reopened as to the matters agreed upon, and shall not be modified, by any officer, employee, or agent of the United States, and (B) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding.” (Emphasis supplied.)

Statement of the Case.

Pursuant to the Renegotiation Act the War Contracts Price Adjustment Board entered into a Renegotiation Agreement with the appellants Paul F. Vokal and Freda Mary Vokal for the payment of \$38,442.26, excessive profits for the fiscal year ended December 31, 1943. The tax credit to which appellants are entitled under Section 3806 of the Internal Revenue Code is \$13,001.22. The said appellants did not petition The Tax Court of the United States for a redetermination of the amount of excessive profits received by them as provided by Section 403(e) of the Renegotiation Act, and the period for filing such petition has expired.

The Garrett Corporation, California Institute of Technology, and Douglas Aircraft Company, Inc., in compliance with withholding orders issued to them by the Under Secretary of War, withheld for the use of the United States amounts otherwise due the appellants, Paul F. Vokal and Freda Mary Vokal. Thereafter the appellants filed suit against Garrett Corporation, being No. 508,756, and against the California Institute of Technology, being No. 510,156, both in the Superior Court in and for the County of Los Angeles, State of California,

for recovery of the money so withheld. Appellants did not file suit against Douglas Aircraft Company, Inc.

Appellee filed its Amended Complaint against Paul F. Vokal and Freda Mary Vokal wherein it prayed for a declaratory judgment determining that the renegotiation agreement entered into between the parties be declared wholly valid and enforceable; that defendants have no interest in any amounts withheld by Garrett Corporation, California Institute of Technology, and Douglas Aircraft Company, Inc., pursuant to the withholding orders, and have no right to the recovery by suit or otherwise to any of the amounts so withheld; and that the defendants Paul F. Vokal and Freda Mary Vokal be restrained from prosecuting their suits now pending in the Superior Court in and for the County of Los Angeles, State of California, against Garrett Corporation and California Institute of Technology [T. R. 8].

By their Answer appellants admitted that they executed the said Agreement attached to the Amended Complaint [T. R. 16]. They have not pleaded or offered to prove any fraud or malfeasance inducing the execution of the contract.

Upon a Motion for Summary Judgment the Court concluded:

- (a) That a valid agreement had been entered into;
- (b) There was no genuine issue as to any material fact for the reason that defendants had “not pleaded or offered to prove any fraud or malfeasance or a willful misrepresentation inducing the execution of the contract.”

The Motion for Summary Judgment of the Appellee, United States of America, was granted.

POINT I.

The Answer Did Not Raise Any Genuine Issue of Fact.

Careful examination of the Answer does not disclose any fraud or malfeasance or a wilful misrepresentation on the part of the War Contracts Bond. The question presented by a motion for summary judgment is whether or not there is a genuine issue of fact. Rule 56c, Federal Rules of Civil Procedure, does not contemplate that the court shall decide such issue of fact, but shall determine only whether one exists. (*Ramsouer v. Midland Valley R. Co.*, 135 F. 2d 101, 103 (C. C. A. 8).)

In the case of *United States v. Maryland Casualty Co.*, 147 F. 2d 423 (C. C. A. 5), the court said:

“Summary judgments are looked upon with favor and will be upheld unless some genuine issue of fact is presented.”

Rule 56c does not provide any method for exactly determining the presence of any issue of fact, and so each case depends upon the facts peculiar to it. Speaking in general terms, the court is not authorized under the rule to try issues of fact but it has the power to penetrate the allegations of fact in the pleadings and look to any evidential source to determine whether there is an issue of fact to be tried. (*Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co.*, 137 F. 2d 871 (C. C. A. 6).)

The court in *Schreffler v. Bowles*, 153 F. 2d 1 (C. C. A. 10), says at page 3:

“The salutary purpose of Rule 56 is to permit speedy and expeditious disposal of cases where the pleadings do not as a matter of fact present any sub-

stantial question for determination. Flimsy or transparent charges or allegations are insufficient to sustain a justifiable controversy requiring the submission thereof. The purpose of the rule is to permit the trier to pierce formal allegations of fact in pleadings and grant relief by summary judgment when it appears from uncontroverted facts set forth in affidavits, depositions or admissions on file that there are as a matter of fact no genuine issues for trial.”

See, *e. g.* :

Sabin v. Home Owners' Loan Corporation, et al.,
151 F. 2d 541 (C. C. A. 10);

*Madeirense Do Brasil S/A v. Stulman-Emerick
Lumber Co.*, 147 F. 2d 399 (C. C. A. 2).

The appellants, although given an opportunity to file affidavits in support of the contentions in their Answer, failed to file them.

In *Gifford v. Travelers Protective Assn. of America*, 153 F. 2d 209, at page 211 (C. C. A. 9), the court gave an opportunity to plead by way of reply and says:

“By failing to avail himself of this opportunity, plaintiff in effect admitted the facts alleged in the affidavit supporting the motion for summary judgment and left the trial court no alternative.”

Also in *Engl v. Aetna Life Ins. Co.*, 139 F. 2d 469, 473 (C. C. A. 2), it is said:

“Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment.”

The Trial Court determined that Appellants' Answer did not raise any issues which fell within the exception of Section 403(c)(4) of the Renegotiation Act.

POINT II.

The Defense Set Forth in the Answer of Appellants May Not Be Raised in This Court.

The constitutional validity of the Renegotiation Act has been settled by the Supreme Court. (*Spauling, et al. v. Douglas Aircraft Co., Inc., et al.*, 154 F. 2d 419 (C. C. A. 9); *Pownall, et al. v. United States*, 159 F. 2d 73 (C. C. A. 9); *Aircraft & Diesel Equipment Corp. v. Hirsch, et al.*, 331 U. S. 752.)

The statute comes before the court replete with provisions to protect contractors and to assure fair treatment to all aggrieved persons. It is the product of most careful congressional consideration. Rarely has the operation of legislature been so carefully watched, so widely discussed; rarely have hearings on the disputed points been so intensive; rarely has there been such a studious effort to establish fair administrative procedure designed to protect public and private interests alike; and rarely has there been such a high degree of administrative success.

The Act authorizes the War Contracts Board to make final or other agreements with a contractor [403(c)(4), Reneg. Act of 1943] and "any such agreement shall be conclusive according to its terms, except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact." To defeat appellee's action the appellants must show that fraud, malfeasance or willful misrepresentation of a material fact induced the contract. Therefore, the primary question which the Trial Court had to deter-

mine was whether the United States Government, acting through its agents, the War Contracts Board, induced the execution of the contract entered into with appellants by fraud or malfeasance or a willful misrepresentation.

Prior to the entering into of an agreement the Act provides for a conference with the contractor by giving notice and a hearing in an endeavor to make a final or other agreement with him with respect to elimination of excessive profits [403(c)(1), Reneg. Act, 1943]. A hearing in fact was given to appellants and every opportunity to present evidence and argument. They do not contend that they were not given such a hearing for their Answer does not indicate otherwise.

On February 25, 1944, the Renegotiation Act of 1942 was amended by the Revenue Act of 1943. Section 403(e)(2) of the Renegotiation Act, as amended, made a special remedy available to a contractor who felt aggrieved by a unilateral determination of the Secretary of the amount of excessive profits made after the enactment of the Revenue Act of 1943 by providing for a redetermination of the amount of such profits by The Tax Court of the United States. Section 403(c)(1) of the statute provides that the renegotiating officials shall furnish to contractors upon request a statement of facts used as a basis for and the reasons for the Board's determination [see T. R. 15]. Before signing the Renegotiation Agreement¹ the appellants could have submitted the

¹See Exhibit A attached to Amended Complaint, T. R. pp. 9-15.

amount determined by the War Contracts Board for hearing upon its merits to The Tax Court. Under the Renegotiation Act The Tax Court's functions must be fully performed before judicial intervention may take place at the instance of a litigant.

In the case of *Aircraft & Diesel Equipment Corp. v. Hirsch, et al.*, 331 U. S. 752, the Supreme Court held that the doctrine of exhaustion of administrative remedies applies to such issues as statutory coverage and amount. The contention made by the appellants that the Board did not have jurisdiction because the contracts were less than \$500,000 is one of coverage and falls within the jurisdiction of The Tax Court. See, also, *Sampson Motors, Inc. v. United States*, 168 F. 2d 878 (C. C. A. 9).

Since appellants ignored the privilege of going to The Tax Court when the opportunity was made available, they obviously cannot now complain, and their failure constitutes an election to abide by the determination as to the amount agreed upon. To permit appellants to maintain the suits against Garrett Corporation and California Institute of Technology after they have foreclosed by their own actions the right of redetermination, would in face of the statute make a mockery of it.

In *Lichter, et al. v. United States*, 160 F. 2d 329, Aff'd. 334 U. S. 742, at page 792, the court, speaking of the

failure to petition The Tax Court for a redetermination, said:

“Failure of respective petitioners to exhaust that procedure has left them with no right to present here issues such as those to coverage and the amount of profits which might have been presented there.”

The rule requiring exhaustion of an administrative remedy is one of judicial administration—not merely a rule governing the exercise of discretion—and is applicable to proceedings at law as well as suits in equity. This is the language of the Supreme Court in its opinion in the case of *Myers v. Bethlehem Corp.*, 303 U. S. 41, set forth in note 9 at page 51 of the opinion. The court cites *First National Bank v. Board of County Commissioners*, 264 U. S. 450, 455, and *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 343—both suits at law. It is submitted that these two cases sustain the proposition in support of which they are cited, and their logic sustains the Government’s contention that The Tax Court has exclusive jurisdiction to decide, in the first instance, all questions presented by appellants in their Answer.

Having executed the Renegotiation Agreement, Section 403(c)(4) of the Renegotiation Act of 1943 prohibits the annulling, modification or setting aside of such agreement, unless there is a showing “of fraud or malfeasance or a willful misrepresentation of a material fact.” The special defenses urged by the appellants do not fall within any of these categories.

Conclusion.

A study of the pleadings reveals that appellants' Answer raised only issues over which The Tax Court had exclusive jurisdiction. Having failed to go to The Tax Court, they cannot try issues which the statute expressly provides 'are within' the jurisdiction of The Tax Court. Their contentions are based upon strained and distorted interpretations of the cases cited in order to invoke the aid of the court to relieve them of their own malfeasance. The court found that the contract was valid and there was no fraud or malfeasance or willful misrepresentation in the execution of it. Having determined this, all of the other contentions of the appellants fall of their own weight. This case was exactly the sort to which the remedy by summary judgment was intended.

For the reasons above set forth it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CLYDE C. DOWNING,
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No. 12209

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FREDA MARY VOKAL, CHARLES DAVISON, and ROMEYN
B. SAMMONS, Executors of the Estate of Paul F. Vokal,
deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANTS.

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AUG - 6 1949

PAUL P. O'BRIEN,

CLERK



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REPLY BRIEF FOR APPELLANTS.

Under Point I of Appellee's Brief (p. 5) it quotes from *Gifford v. Travelers Protective Assn. of America*, 153 F. 2d 209, page 211. This case involved fraternal benefit insurance contract. The only question involved was the validity of certain clause in contract limiting period for commencement of suit to a special period of six months. The suit was brought one year, lacking two days, after cause of action accrued. The plaintiff therein did not allege any fraud or waiver, and there was no doubt about the right of the insurance carrier to fix a time in the contract for filing claim or bringing action to recover on contract.

In the instant case appellee submitted no evidence, proof or affidavits which required appellant to file affidavits in

reply. Appellants' answer is specific and detailed, and required no support or amplification. It is in no sense general in its allegations.

At page 4 appellee quotes from *United States v. Maryland Casualty Company*, 147 F. 2d 423. This case involved merely the terms of a contractor's surety bond, question was whether "delay" caused by order of United States engineer constituted "labor and material" within the Act of Congress and the bond sued on. The Court found at page 424(1) no "material factual differences between the parties, as the affidavits offered leave the facts practically without dispute."

In the instant case the appellants allege their right to recover ALL MONEYS WITHHELD BY THEIR DEBTORS AND COLLECTED BY APPELLEE. They allege in their answer specifically and in detail fraud, malfeasance or a wilful misrepresentation on the part of the agents of the War Contracts Price Adjustment Board. In addition thereto they show that the retention of the moneys so withheld and collected constitutes fraud in itself for which they are granted a remedy for recovery, and quote in support of such contention from *Bull v. United States*, 295 U. S. 247, at page 260, Mr. Justice Roberts speaking for the Court:

"Had the Government instituted an action at law, the defense would have been good. The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent. *U. S. v. State Bank*, 96 U. S. 30. *While here the money was taken through mistake without any element of fraud, the unjust retention is immoral and amounts to a fraud on the taxpayer's rights. What*

was said in the State Bank case applies with equal force to this situation. *An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice to refund. The form of the indebtedness or the mode in which it was incurred is immaterial . . . In these cases (cited) and many others that might be cited, the rules of law applicable to individuals were applied to the United States. A claim for recovery of money so held may not only be the subject of a suit in the Court of Claims, . . . but it may be used by way of recoupment in an action by the United States arising out of the same transaction. (Pp. 34-36, Appellants' Brief) . . . This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action is timely."* (Emphasis added.)

The Court further held in the foregoing case, that the Government gave him a right of credit for refund when it proceeded against him for collection of the income tax. The same principle of law is applicable here.

In *Doehler v. United States* (2d Cir.), 149 F. 2d 130, 135, the Court holds that a litigant has a right to a trial

"where there is the slightest doubt as to the facts and a denial of the right is reviewable; but refusal to grant a summary judgment is not reviewable . . . "

This was an appeal from a summary judgment which was reversed, the appellate court stating that trial judges should exercise great care in granting motions for summary judgments. (App. Br. pp. 18-26.)

The burden is on the moving party and every doubt should be resolved against him. (App. Br. pp. 19, 22.)

Appellants set up cross claims as recoupment. Determination of their demands rather than independent action is favored. *Parmelee v. Chicago Eye Shield Co.*, 157 F. 2d 582, 585(1-3), 586(6-7). [T. R. pp. 24-27, Appellants' Second, Third and Fourth Defenses, p. 29, prayer for judgment g and h.]

Replying to Appellee's Point II of its brief: Appellants have not assailed generally the constitutional validity of the Renegotiation Act of 1943. Under Point Five, page 46 of Appellants' Brief, they deny the power of Congress to deprive the District Court of jurisdiction to review the action of the Board. They deny that the Congress has the power or authority to substitute for the constitutional courts any agency for the final determination of the existence of facts or law (p. 48). They cite several authorities in support thereof, and particularly that of *Crowell v. Benson*, 285 U. S. 22, 56, 59, 60, 63, 64. (App. Br. pp. 47-49.)

The appellee stresses appellants' failure to resort to the Tax Court of the United States, and at page 8 of its brief cites *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U. S. 752, completely disregarding the express holding by that case that a subcontractor such as appellants might

and should have relief in actions against his contractor. At page 775, Mr. Justice Rutledge, speaking for the Court said:

“In the first place, there can be no doubt of the availability or indeed the certainty and effectiveness of appellant’s remedy at law upon its contracts against its customers claimed to owe it money under these agreements. *Suits of that character are not forbidden, either expressly or impliedly by the Renegotiation Acts. Nor are they made dependent upon completion of the Tax Court proceedings . . .*

“In addition there is special reason in the statutory provisions why that course should be followed rather than allowing the present suit. Appellant is, as we have pointed out, a subcontractor, not a contractor with the Government. While its suit could be instituted directly only against the contractor with whom it had dealt, nevertheless it is hardly conceivable that the Government would permit the suit to go to final judgment without intervention by it, or, at the least undertaking the responsibility for making the defense . . .”

The Court then quoted Section 403(c)(2) of the Renegotiation Act which indemnifies the contractor for all liability to the subcontractor, and said further:

“In the face of this indemnity, the contractor becomes substantially a stakeholder as between the Government and the subcontractor, and the latter’s suit against the contractor, if terminated favorably to the complainant, would obligate the Government to

indemnify or reimburse the contractor for the liability thus incurred . . .” (App. Br. pp. 27-29.)

The appellants proceeded in the manner approved in the foregoing authority. They brought two actions in the Superior Court of Los Angeles County against their contractors to recover the moneys withheld; the Government did not intervene, but it did appear in the cases and defend, and the present suit in the District Court and this appeal are the result of those two original actions in the Superior Court. Under the authority cited these actions in the Superior Court should be allowed to go to trial, and the injunction of the District Court restraining appellants from prosecuting such actions should be vacated, and the District Court should be reversed.

Respectfully submitted,

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FRANK C. SHOEMAKER,

Attorneys for Appellants.

No. 12211

United States
Court of Appeals
for the Ninth Circuit

EVERT L. HAGAN, doing business as El Rey
Cheese Co.,

Appellant,

vs.

CENTRAL AVENUE DAIRY, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED

MAY 1 1940

PAUL P. O'BRIEN, -

No. 12211

United States
Court of Appeals
for the Ninth Circuit

EVERT L. HAGAN, doing business as El Rey
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Transcript of Record

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Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Southern
District of California, Central Division

No. 8741-BH

TITLE INSURANCE AND TRUST COMPANY,
a corporation,

Plaintiff,

vs.

EVERT HAGAN, doing business as EL REY
CHEESE CO., and CENTRAL AVENUE
DAIRY, INC., a corporation,

Defendants.

COMPLAINT IN INTERPLEADER

Plaintiff complains of the defendants above named,
and Alleges:

I.

This action arises under the Act approved January 25, 1948, Chapter 646, Public Law 773, Laws of the 80th Congress, Second Session; United States Code, Title 28, Section 1335, as hereinafter more fully appears.

Plaintiff is a corporation incorporated under the laws of the State of California, having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

Defendant, Evert Hagan, doing business as El Rey Cheese Co., is a resident of and has his place of busi-

ness in the City of Los Angeles, County of Los Angeles, States of California. [2]

Defendant, Central Avenue Dairy, Inc., a corporation, is a corporation organized under the laws of the State of Arizona, and having its principal place of business in the City of Phoenix, State of Arizona.

The matter in controversy exceeds the sum of \$500.

II.

That on or about September 6, 1946, defendants, Evert Hagan, doing business as El Rey Cheese Co., and Central Avenue Dairy, Inc., opened an escrow with plaintiff, known in its files and records as Escrow No. 2494622, and said defendant, Evert Hagan, deposited the sum of \$1750 therein, to be disbursed after certain reconveyances of trust deeds in said instructions described had been received and upon further instructions for disbursement "from both Evert Hagan and Central Avenue Dairy, Inc., or from a court of competent jurisdiction."

III.

That thereafter certain requests for reconveyances of deeds of trust were deposited in said escrow and recorded and used in accordance with the escrow instructions of defendants; but no further instructions for the disbursement of said sum of \$1750 have ever been given plaintiff by both defendants, Evert Hagan and Central Avenue Dairy, Inc., a corporation, and no instruction has ever been given plaintiff by a court of competent jurisdiction or any court.

That thereafter, and on or about December 3, 1947, said Evert Hagan, doing business as El Rey Cheese Co., made demand upon plaintiff for the return of said sum of said \$1750 to him, which demand has thereafter been repeatedly made upon plaintiff.

That said Central Avenue Dairy, Inc., by and through its attorneys has refused to approve or acquiesce in such demand of said defendant. Evert Hagan, doing business as El Rey Cheese Co., and has demanded that said monies so deposited in said escrow [3] be turned over and paid to it because of said releases and reconveyances of deeds of trust deposited and used in said escrow as provided for in said written instructions.

IV.

That by reason of the conflicting claims and demands of defendants, plaintiff is in doubt as to which defendant is entitled to receive the monies deposited with plaintiff as hereinbefore set forth and has no remedy at law and cannot determine said claims except at great peril and risk.

V.

That plaintiff makes no claim to said sum of \$1750, except to have said sum disbursed to the person legally entitled thereto.

VI.

That plaintiff has deposited with the Registry of this Court said sum of \$1750 there to abide the judgment of the Court. That said deposit and said pay-

ment so made into Court was made by plaintiff herein at the commencement of this action.

VII.

That it has become necessary for plaintiff to institute this action in interpleader to avoid a multiplicity of actions, unnecessary attorney's fees, and costs of suit, and irreparable injury and damage.

Wherefore, in consideration of the premises, and inasmuch as plaintiff is without an adequate remedy except by this action of interpleader, plaintiff prays:

That process issue out of this Honorable Court directed to the defendants, and each of them, and that an order of injunction against said defendants, and each of them, be made enjoining the defendants, and each of them, from instituting or prosecuting any suit or proceeding in any State Court or in any [4] United States Court, on account of the monies described in this complaint and deposited by plaintiff in the Registry of this Court until further order of the Court.

That such process and order of injunction be made returnable at such time as this Honorable Court shall determine and shall be addressed to and served by the United States Marshals for the respective districts wherein said defendants reside or may be found.

That said defendants, and each of them, be required to interplead concerning their claims, if any, to the above-described money and to set forth their interest in and claims to the same.

That the Court determine the validity of their respective interest and claims, and order and direct the disposition of said money.

That upon the hearing and determination of this cause, plaintiff be discharged from any and all further liability to the defendants, and each of them, on account of the money above described, and that said injunction be made permanent; and for such other, further, and different general relief as to the Court may seem meet and proper.

ARCH. H. VERNON,
LAWRENCE L. OTIS,
GILBERT E. HARRIS,

By /s/ ARCH. H. VERNON,
Attorneys for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Oct. 7, 1948. [5]

[Title of District Court and Cause.]

DEPOSIT

To: Mr. Edmund L. Smith, Clerk of the United States District Court:

Plaintiff herewith hands you for deposit in the Registry of the Court in the above action, the sum of \$1750 (Check No. 439367, drawn by Title Insurance and Trust Company on The Farmers and Merchants National Bank of Los Angeles, at Los Angeles, California, payable to you); the above being

all of the property described in the complaint in the above-entitled action and interpleaded by plaintiff herein.

Dated the 7th day of October, 1948.

ARCH. H. VERNON,
LAWRENCE L. OTIS,
GILBERT E. HARRIS,

By /s/ ARCH. H. VERNON,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 7, 1948. [7]

[Title of District Court and Cause.]

MOTION

Plaintiff moves the Court for an order directing the Clerk of said Court to issue a summons herein directed to defendant, Evert Hagan, doing business as El Rey Cheese Co., requiring said defendant to answer the complaint herein within twenty days after service of said summons upon him, and notifying him that, if he fails to do so, judgment by default will be taken against him for the relief demanded in the complaint, and addressed to the United States Marshal of the Southern District of the State of California, in which said defendant resides, for service upon said defendant; and to issue an additional summons directed to defendant, Central Avenue Dairy, Inc., a corporation, requiring said defendant to answer the complaint herein with twenty days after the service of such summons upon

it, and notifying it that if it fails so to do, [8] judgment by default will be taken against it for the relief demanded in the complaint, and addressed to the United States Marshal of the District of Arizona, State of Arizona, in which said defendant resides; and

For an order of injunction enjoining said defendants, and their respective attorneys, agents and representatives, or either or any of them, until the further order of this Court, from instituting or prosecuting any suit or proceeding in any State Court or in any United States Court on account of the money described in the complaint herein; and

Further ordering said defendants, and each of them, to show cause, if any they have, at such time as shall be determined by the Court, why the foregoing order of injunction should not be made permanent; and why a decree should not be made and entered discharging plaintiff from all and any further liability to said defendants, or any or either of them; and for such other and further orders and decrees as may be necessary and proper in the premises; and

For a further order directing that a copy of such order shall be served upon each of the defendants with the summons and copy of the complaint ordered served upon them herein, by said respective United States Marshals, and that the respective United States Marshals shall make return of service of such process and a copy of said complaint and a copy of such order not later than twenty days after the service thereof.

This motion is based upon the verified complaint herein, and the provisions of Section 1335, Title 28 United States Code, approved January 25, 1948, and effective September 1, 1948.

Dated October 7th, 1948.

ARCH. H. VERNON,
LAWRENCE L. OTIS,
GILBERT E. HARRIS,

By /s/ ARCH. H. VERNON,
Attorneys for Plaintiff.

Acknowledgment of Service.)

[Endorsed]: Filed Oct. 7, 1948. [9]

[Title of District Court and Cause.]

ORDER OF INJUNCTION AND FOR PROCESS

Good cause appearing therefor from the verified complaint on file herein:

It Is Ordered that the Clerk of the above-entitled court issue a summons herein directed to defendant, Evert Hagan, doing business as El Rey Cheese Co., requiring said defendant to answer the complaint herein within twenty days after the service of said summons upon him, and notifying him that, if he fails to do so, judgment by default will be taken against him for the relief demanded in the complaint, and addressed to the United States Marshal of the Southern District of the State of California for service upon said defendant; and to issue an

additional summons directed to the defendant, Central Avenue Dairy, Inc., a Corporation, requiring said defendant to answer the complaint herein within [10] twenty days after the service of such summons upon it, and notifying it that if it fails to do so, judgment by default will be taken against it for the relief demanded in the complaint, and addressed to the United States Marshal of the District of Arizona, State of Arizona; and

It Is Further Ordered that said defendants and their respective attorneys, agents, and representatives, or any or either of them, are enjoined from instituting or prosecuting any suit or proceeding in any State Court, or in any United States Court, on account of the money described in the complaint herein, until the further order of this Court herein; and

It Is Further Ordered that said defendants, and each of them, show cause, if any they have, on the 8th day of November, 1948, at 10:00 o'clock of said day, at the Court Room of the Honorable Ben Harrison, Judge of this Court, in the Federal Building in the City of Los Angeles, County of Los Angeles, State of California, why the foregoing injunction should not be made permanent and why a decree should not be made and entered discharging Plaintiff from any and all liability to said defendants, or any or either of them; and for such other and further orders and decrees as may be proper and necessary in the premises; and

It Is Further Ordered that a copy of this order be served upon each of the defendants, with the

summons and a copy of the complaint ordered served upon them herein by said respective United States Marshals, and that the said respective United States Marshals shall make return of the service of said summons and a copy of said complaint, and a copy of this order, not later than twenty days after service thereof.

Dated: the 7th day of October, 1948.

/s/ LEON R. YANKWICH,
Judge of the United States
District Court.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 7, 1948. [11]

[Title of District Court and Cause.]

ANSWER, CLAIM, AND CROSS-COMPLAINT
OF DEFENDANT-CLAIMANT, EVERT L.
HAGAN.

Comes Now, Evert L. Hagan, defendant-claimant, in the above-entitled cause of action, and denies, admits, alleges and avers as follows:

ANSWER

I.

This action arises under the Act approved January 25, 1948, Chapter 646, Public Law 733, Laws of the 80th Congress, Second Session; United States Code, Title 28, Section 1335, as hereinafter more fully appears.

Plaintiff is a corporation incorporated under the

laws of the State of California, having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California. [12]

Defendant, Evert Hagan, doing business as El Rey Cheese Co., is a resident of and has his place of business in the City of Los Angeles, County of Los Angeles, State of California.

Defendant, Central Avenue Dairy, Inc., a corporation, is a corporation organized under the laws of the State of Arizona, and having its principal place of business in the City of Phoenix, State of Arizona.

That the matter in controversy exceeds the sum of \$500.00.

II.

Defendant, Evert L. Hagan, admits that the plaintiff, Title Insurance and Trust Company, a corporation, of the City of Los Angeles, County of Los Angeles, State of California, located at 433 South Spring Street, is the escrow-holder in escrow No. 2-494-622, wherein there is deposited the sum of \$1750.00; that said escrow was entered into between Evert L. Hagan, doing business as El Rey Cheese Co., and Central Avenue Dairy, Inc., a corporation, on or about the 6th day of September, 1946; this defendant admits that both Evert L. Hagan and the Central Avenue Dairy, Inc., have made demand and claim from the plaintiff herein, Title Insurance & Trust Company, a corporation, for said \$1750.00; that this defendant Evert L. Hagan, admits that the plaintiff, Title Insurance & Trust Company, is a disinterested stake-holder of the said sum of

\$1750.00; and further admits that unless interpleader is adjudged proper, that the plaintiff, Title Insurance & Trust Company will be placed in great peril of being subjected to double liability on account of said sum.

Wherefore, defendant, claimant, Evert L. Hagan, desires to join in the prayer of the plaintiff, Title Insurance & Trust Company, that an interpleader by judged proper, that plaintiff be allowed to pay into the registry of the Court, the sum of \$1750.00 less its costs herein incurred and a reasonable sum as and for its attorney fees and be discharged from all liability to Evert L. Hagan, and the Central Avenue Dairy, Inc., on account of said escrow agreement, and [13] defendant, claimant, Evert L. Hagan, prays that the temporary injunction heretofore issued restraining Evert L. Hagan, and the Central Avenue Dairy, Inc., from proceeding in any State or Federal Court, be made permanent.

And, Evert L. Hagan, Bases His Claim for the Said Sum of \$1750.00 Upon the Following Allegations:

CLAIM

I.

Repeats each and all of the allegations contained in Paragraph I, of the foregoing Answer and makes the same a part hereof as though set forth herein in full.

II.

Claimant, Evert L. Hagan, alleges that for a number of years prior to 1932, he had, at his own ex-

pense, and outlay of time, carried on experiments for the manufacture of cheese, and cheese food products. That, as a result of his experiments, Evert L. Hagan perfected and invented formulas for manufacturing two proudcts, the same being:

- 1—"Queso Duro Cheese," otherwise known as "La Barca";
- 2—"Queso Blanco Cheese," otherwise known as "El Rey Cheese."

Claimant alleges that the entire process for the manufacture of these products was the result of the inventive efforts of this claimant, Evert L. Hagan; that when the same was perfected, he entered into an oral agreement with the Central Avenue Dairy, Inc., whereby they were given the formulas and secret processes, and the right to produce such cheese, but, this claimant, Evert L. Hagan, reserved the sole right to distribute and sell said cheese, in the entire United States. Claimant, Evert L. Hagan, alleges that pursuant to said oral agreement, the Central Avenue Dairy, Inc., did manufacture said cheese, according to the process and trade secrets perfected by this claimant, Evert L. Hagan, and this claimant set up distribution outlets, in the States of Texas, New Mexico and California, and, Arizona; Claimant further [14] alleges that this arrangement was continued from 1932 until November 8th, 1938, when a different arrangement was entered into between this claimant, Evert L. Hagan and the Central Avenue Dairy, Inc., by written contract, a copy of which is hereto attached, and marked

Exhibit "A", which is made a part hereof, by reference, as though set forth herein in full.

Claimant, Evert L. Hagan, alleges that under the said written agreement of November 8th, 1939, this claimant gave to the said Central Avenue Dairy, Inc., the sole right to retail and wholesale the two cheese products, "La Barca" and "El Rey" in the States of Arizona, New Mexico and Texas; and that the said Central Avenue Dairy, Inc., agreed to furnish "La Barca" and "El Rey Cheese" to claimant herein, Evert L. Hagan, exclusively in the State of California, at a price schedule as set forth in Paragraph Three of said written agreement and contract of November 8th, 1938, which schedule is as follows:

Queso Duro Cheese, Brand "La Barca"	
Bricks and Loaves.....	71½c
Talls (11½ lbs.)	8c
Barcas (3 lbs.)	8c
Queso Blanco Cheese, Brand "El Rey"	
10 lbs.	9c

III.

Claimant, Evert L. Hagan, further alleges that at the time of the written agreement of November 8th, 1938, there was a balance due from claimant Evert L. Hagan, to the Central Avenue Dairy, Inc., for the past deliveries made to claimant Evert L. Hagan, and that said balance due amounted to \$3795.04; that in said written agreement of November 9th, 1938, it was agreed in Paragraph Four thereof, that

the said amount was to be paid to the Central Avenue Dairy, Inc., in the following manner: [15]

“First Party agrees specifically to pay 1c per pound over and above the prices scheduled aforesaid for every pound of cheese ordered by him hereafter, which 1c per pound is to be applied to the repayment of the above account stated as set forth hereinabove, such added payment of 1c per pound to be paid until the account in the sum of \$3795.04 is paid in full, with interest thereon from date at the rate of six per cent per annum.”

And it was further agreed in said agreement as follows:

“First Party specifically agrees to order and purchase from Second Party, freight to be paid by the First Party, under the terms and conditions aforesaid, not less than 9,000 pounds of cheese per month hereafter, of either “El Rey” or “La Barca” or both, in the aggregate until such time as the account of \$3795.04 and interest had been paid in full;

“8. Second Party agrees to ship such amount and kinds of cheese to the First Party as ordered by the First Party, and accompanied by the check of the First Party, as hereinabove provided, providing the sale price of said cheese, as herein provided, covering the sale price of said cheese, as per schedule aforesaid, plus one cent per pound, on all cheese ordered, which one cent per pound, Second Party agrees to apply to the delinquent account of the First Party as aforesaid. Second Party further

agrees to supply First Party, freight to be paid by First Party, promptly upon receiving the order of the First Party”;

IV.

Said contract of November 8th, 1938, guaranteed to the said Evert L. Hagan, that he was to receive the two named types of cheese exclusively in the State of California, from the Central Avenue Dairy, Inc., said contract providing:

“Second Party agrees to supply no other person or persons in the State of California with the grades and types of cheese, hereinbefore referred to, during the life of this agreement, and [16] Second Party agrees to supply no cheese of the types aforesaid to any person anywhere, knowing said cheese is to be offered for sale in competition with First Party in the State of California during the life of this agreement.”

V.

Claimant, Evert L. Hagan, alleges that the duration of said agreement was provided in Paragraph 12 thereof as follows:

“It is hereby mutually agreed by and between the parties hereto that this agreement shall remain in full force and effect so long as the First Party owes any balance of account to Second Party, either in connection with the stated balance due at the date of the execution of this agreement, to wit, \$3795.04 and interest, or in connection with any further credit extended to the First Party during the life of this agreement, which additional credit

may be granted at the option of the Second Party, but it is distinctly understood that it is not required to be given under the terms of this agreement.”

VI.

Claimant, Evert L. Hagan, alleges that simultaneously with the entering into of the written agreement of November 8th, 1938, claimant executed his promissory note in the amount of \$3795.04, with interest at 6% per annum, secured by deed of trust upon lots 14 and 15, Block 9, Tract 5329 as per Map recorded in Book 60, Page 39, of Maps, in the office of the County Recorder of Los Angeles County, State of California, and claimant also executed a chattel mortgage on all of the personal property located on said afore-described real property; claimant alleges that said deed of trust and chattel mortgage were given to secure to the Central Avenue Dairy, Inc., full performance of the contract agreement of November 8th, 1938, on behalf of this claimant, Evert L. Hagan.

Claimant alleges that upon September 6th, 1946, the security given by claimant, Evert L. Hagan, as set forth in the preceding [17] paragraph, was released by the said Central Avenue Dairy, Inc., and this claimant deposited the sum of \$1750.00, now the subject of this interpleader action, with the Title Insurance & Trust Company, as escrow holder in lieu of said deed of trust and chattel mortgage; claimant alleges that this exchange of security was effected after numerous breaches of the contract of November 8, 1938.

VIII.

Claimant, Evert L. Hagan, alleges that from and after November 8, 1938, he, duly performed and fully complied with all the obligations, conditions, precedent and terms imposed upon him by the said written agreement; that he has at all times ordered, received and paid for all deliveries of the two cheeses that were contracted for therein, and that he has ordered an amount equal to the amount agreed upon in said written contract of November 8th, 1938; but claimant alleges that notwithstanding claimant's full performance, the Central Avenue Dairy, Inc., committed the following breaches of the contract of November 8th, 1938, to the injury and damage of the claimant, Evert L. Hagan:

1—Upon July 1st, 1941, contrary to Paragraph three of said written agreement of November 8th, 1938, the Central Avenue Dairy, Inc., refused to deliver cheese at the schedule of prices therein set up, but required an additional one cent per pound; that on August 15th, 1941, the Central Avenue Dairy, Inc., wholly disregarding said contract clause setting up the schedule of prices, and arbitrarily refused to deliver cheese thereunder at said scheduled prices, but demanded fifteen cents per pound; that upon April 1st, 1943, the said Central Avenue Dairy, Inc., arbitrarily raised said price, contrary to said price schedule set out in the written contract of November 8th, 1938, to eighteen cents per pound.

2—The said Central Avenue Dairy, Inc., did on September 16th, 1939, without just cause, failed and

refused to [18] make any further shipments of El Rey Cheese,

3—That said Central Avenue Dairy, Inc., did, during the term and life of said contract, ship both “La Barca” and “El Rey” cheese to Ollie Brown, doing business as The Ramona Provision Company, in the City of Los Angeles, County of Los Angeles, State of California, and to Thomas Gonzales, doing business as the American Chile Products, in the City of Los Angeles, County of Los Angeles, State of California, without the consent and against the will of this claimant.

4—The said Central Avenue Dairy, Inc., did, contrary to the written agreement of November 8th, 1938, shipped during the month of July and August, 1945, and prior thereto, cheese which was not of good quality and merchantable condition, and the same was of such poor quality and in such a condition of spoilage that it was seized by the United States Government Food and Drug Administration, and the Food and Drug Administration of the State of California.

5—During the month of August, 1945, the Central Avenue Dairy, Inc., at a time when said Central Avenue Dairy, Inc., admitted there was yet to be delivered to this claimant, Evert L. Hagan, under the agreement of November 8th, 1938, a remainder of 110,000 pounds of cheese, did refuse and fail to make any further deliveries under said contract, and does not and will not at this time comply with the terms of said written agreement and does now con-

tinue and fail and refuse orders for said cheese from this claimant, Evert L. Hagan.

IX.

Claimant alleges that under the terms of the written agreement of November 8th, 1938, there was only one means for the payment of the balance due to the Central Avenue Dairy, Inc., in the amount of \$3795.04 and that that was by the payment of one cent per pound, additional for each pound delivered under the agreement of November 8th, 1938. Claimant alleges that by reason of the breach set forth herein, payment by the claimant in the manner as provided by the contract was made impossible. Claimant alleges this impossibility was [19] brought about solely due to the acts and conduct of the said Central Avenue Dairy, Inc., and that the legal effect of said acts and conduct by said Central Avenue Dairy, Inc., was to effect a waiver of payment of said balance and the right to have and retain security for the payment thereof; that by reason of the breaches alleged, which prevented performance on behalf of this claimant, Evert L. Hagan, a waiver of the rights to payment in the manner provided for in the contract by Central Avenue Dairy, Inc., to all of its right to make any claim upon the fund before the Court, to wit, the \$1750.00 now deposited in the registry of the Court.

Wherefore, this claimant prays the Court to make an Order adjudging that Evert L. Hagan, alone, is entitled to receive the sum of \$1750.00, less costs and a reasonable sum for attorneys' fees, heretofore

deposited in the registry of this Court by the Title Insurance & Trust Company; that Evert L. Hagan be awarded his costs herein incurred, and for such other and further orders as the Court may deem just and proper in the premises.

And the Claimant, Evert L. Hagan, Further as Cross - Complainant Against Central Avenue Dairy, Inc., Alleges and Avers as Follows:

CROSS-COMPLAINT

I.

Cross-Complainant, Evert L. Hagan, re-alleges and by reference makes Paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the Claim of Evert L. Hagan, a part hereof as though set forth herein in full.

II.

Cross-Complainant alleges that by reason of the breach of the contract as alleged in Paragraph VIII of the claimant's claim, this cross-complainant has been damaged in the sum of \$200,000.00. [20]

Wherefore, Cross-complainant prays the Court to award him judgment in the amount of \$200,000.00 and in addition, give him judgment for his costs herein expended, and for such other and further orders the Court may deem proper in the premises.

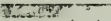
/s/ GUY B. GRAHAM,
Attorney for Claimant and Cross-Complainant,
Evert L. Hagan.

State of California,
County of Los Angeles—ss:

Evert L. Hagan, being first duly sworn, deposes and says: That he is a party defendant, claimant and cross-complainant in the foregoing and above-entitled action; that he has read the foregoing Answer, Claim and cross-complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes to be true.

/s/ EVERT L. HAGAN,
Affiant.

Subscribed and sworn to before me this 29th day of October, 1948.

(Seal)  /s/ MACARIO V. BALLESTEROUS,
Notary Public in and for the County of Los Angeles, California.

My commission expires March 15th, 1949.

[Endorsed]: Filed Nov. 1, 1948. [21]

[Title of District Court and Cause.]

EXHIBIT "A"

Agreement of November 8th, 1938, Between Evert L. Hagan, and Central Avenue Dairy, Inc. [22]

AGREEMENT

This Agreement, made and executed this 8th day of November, 1938, by and between Evert L. Hagan,

Party of the First Part, of 115 North Eastern Avenue, Los Angeles, California, and Central Avenue Dairy, Incorporated, Party of the Second Part, an Arizona Corporation, having its principal offices in the City of Phoenix, County of Maricopa, State of Arizona;

Witnesseth:

Whereas, First Party is in the retail cheese business and has heretofore purchased two grades of cheese from Second Party, which grades of cheese are identified under the brand names of "La Barca" and "El Rey"; and

Whereas, an account has been stated between the parties hereto, arising out of previous transactions whereby it is mutually agreed between the parties hereto that First Party hereto owes to Second Party hereto, as of the date of this agreement, the sum of Thirty-seven hundred ninety-five and 04/100 (\$3795.04) Dollars; and

Whereas, it is the desire of both parties hereto to formulate an agreement for future dealings between the parties and to provide for a means of repayment of the stated balance due aforesaid;

Now, Therefore, in consideration of the premises and of the mutual promises by and between the parties as hereinafter set forth, it is hereby mutually agreed as follows:

1. First Party agrees to withdraw from the retail or wholesale merchandising of cheese under the trade-names of "La Barca" and "El Rey" in the states of Texas, New Mexico and Arizona. First Party further agrees that Second Party [23] shall

have the exclusive right to merchandise cheese under the trade names and brands of "La Barca" and "El Rey" in the three states aforesaid throughout the period of this agreement;

2. First Party agrees to purchase exclusively from Second Party all of those types of cheese merchandised by him in the State of California, which types of cheese are known as "Queso Duro" and "Queso Blanco" under the regulations of the California Department of Agriculture and more particularly described as chile cheese known as "La Barca" and white cheese known as "El Rey"; which types of cheese First Party agrees not to manufacture or purchase elsewhere than from Second Party so long as said types of cheese are available from Second Party upon the order of First Party. First Party reserves the right to manufacture or purchase said types of cheese elsewhere in such amounts and at such times as Second party notifies First Party that Second Party cannot supply said types of cheese in the amounts and at the times as they may be required to the order of First Party;

3. First Party agrees to pay Second Party for such amounts of the aforesaid types of cheese as may be ordered by him as follows:

Queso Duro Cheese, Brand "La Barca"

Bricks and loaves.....	07½c
Talls (11½ lbs.)	08c
Barcas (3 lbs.)	08c

Queso Blanco Cheese, Brand "El Rey"

(10 lbs.)	09c
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4. First Party agrees specifically to pay one (1c) per lb. over and above the prices scheduled aforesaid for every pound of cheese ordered by him hereafter, which one [24] cent per pound is to be applied to the repayment of account stated, as set forth hereinabove, such added payment of one cent per pound to be paid until the delinquent account in the sum of \$3795.04 is paid in full with interest thereon from date at the rate of six (7) % per annum;

5. First party agrees to accompany each order for cheese sent to Second Party with a check drawn in a sum equivalent to payment in full for the amount of cheese so ordered at the prices scheduled in Paragraph 3 hereof, together with one cent per pound added as hereinabove provided for the number of pounds so ordered; such one cent per pound being for application on the past due account hereinbefore set forth;

6. First Party hereby agrees to execute herewith a promissory note in the sum of \$3795.04, with interest thereon at the rate of six per cent per annum, interest payable semi-annually, which note is payable at the rate of ninety (\$90.00) Dollars per month beginning on December 8, 1938, which said note shall be secured by a certain Deed of Trust to be executed concurrently herewith by First Party which Deed of Trust shall grant for security purposes nevertheless Lots 14 and 15, Block 9, Tract 5329, as per map recorded in Book 60, page 39 of Maps in the office of the County Recorder of Los Angeles County, and which Deed shall be subject, nevertheless, only to a certain Deed of Trust made and executed April 20,

1938, to John C. Licht and wife in the sum of \$2,000, the balance due on such Deed of Trust being represented by First Party as \$1850.00 at this date. Said promissory note shall further be secured [25] by a certain chattel mortgage made and executed concurrently herewith pledging all of the personal property located on the above-described premises and used for and in connection with the said cheese business of First Party, or as more particularly set forth in the inventory attached to the said chattel mortgage;

7. First Party specifically agrees to order and purchase from Second Party, freight to be paid by First Party, under the terms and conditions aforesaid, not less than nine thousand pounds of cheese per month hereafter of either "El Rey" or "La Barca," or both in the aggregate until such time as the delinquent account of \$3795.04 has been paid in full;

8. Second Party agrees to ship such amounts and kinds of cheese to First Party as are ordered by First Party and accompanied by the check of First Party, as hereinbefore provided, covering the sale price of said cheese as per schedule aforesaid plus one cent per pound on all cheese ordered, which one cent per pound Second Party agrees to apply to the delinquent account of First Party as aforesaid. Second Party further agrees that all cheese as ordered by First Party shall be of good quality and in merchantable condition. Second Party further agrees to supply said First Party, freight to be paid by First

Party, promptly upon receiving the order of First Party;

9. Second Party agrees to supply no other person or persons in the State of California with the grades and types of cheese, hereinbefore referred to, during the life of this agreement, and Second Party agrees to supply no cheese of the types aforesaid to any person anywhere knowing said cheese to be offered for sale in competition with First Party in the State of California during the life of this agreement.

It Is Mutually Agreed as Follows: [26]

10. It is hereby mutually agreed by and between the parties hereto that should First Party order and Second Party supply more than nine thousand (9,000) pounds of cheese in any given month hereafter, the amount of cheese over and above the nine thousand lbs., together with the payments made thereon, shall apply to the credit of the First Party for the next two-month period subsequent thereto, both as to the requirement that First Party purchase nine thousand pounds of cheese minimum per month, and as to the application of the payment of one cent per pound for such cheese over and above the purchase price to the credit of First Party's promissory note concurrently executed herewith, to the end that for any such three-month period hereafter First Party shall have purchased not less than twenty-seven thousand pounds of cheese, and shall have paid on account of the delinquent account, heretofore set forth, the sum of Two hundred seventy (\$270.00) Dollars over and above the purchase price paid for

cheese received by First Party in accordance with the schedule of prices hereinabove set forth;

11. It is further mutually agreed by and between the parties hereto that in the event of default by First Party of any of the terms and conditions in this agreement set forth, Second Party shall, upon such default, have the right to proceed with the enforcement of the security hereinbefore provided to Second Party by First Party, and that such remedy shall not be exclusive but that Second Party shall have the right or remedy in addition to the enforcement of such security as may be given by law, and such rights or remedies of Second Party are hereby jointly declared to be cumulative in effect and all shall be available to Second Party at one default of First Party;

12. It is hereby mutually agreed by and between the parties hereto that this agreement shall remain in full force [27] and effect so long as First Party owes any balance of account to Second Party, either in connection with the stated balance due at the date of the execution of this agreement, to-wit, \$3795.04, or in connection with any further credit extended to First Party during the life of this agreement, which additional credit may be granted at the option of Second Party, but which it is distinctly understood is not required to be given under the terms of this agreement.

In Witness Whereof, the parties hereto have here-

unto set their hands and seals the day and year first hereinabove written.

EVERT HAGAN,
First Party,
CENTRAL AVENUE DAIRY,
INCORPORATED,
By ED A. GEARE,
President. [28]

RETURN ON SERVICE OF WRIT

United States of America,
District of Arizona—ss:

Civil 8741-BH, So. Dist., Calif.

I hereby certify and return that I served the annexed Answer, Claim, Cross-Complaint of Defendant Complainant Hagan on the therein-named Kramer, Morrison, Roche and Perry by delivering to R. Wm. Kramer, member of firm and statutory agent for Central Avenue Dairy, by handing to and leaving a true and correct copy thereof with Mr. Kramer at 11:45 a.m. on the 9th day of November, personally at Phoenix in said District on the 9th day of November, 1948.

Service, \$2.00; Travel, .06.

B. J. McKINNEY,
U. S. Marshal,
By /s/ M. CASSIE BAKER,
Deputy.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 14, 1949. [29]

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant: Central Avenue Dairy, Inc.

You are hereby summoned and required to serve upon Gilbert E. Harris, plaintiff's attorney, whose address is 202 Title Insurance Building, Los Angeles 13, California, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

(Seal)

EDMUND L. SMITH,
Clerk of Court,

By /s/ G. A. SAUNDERS,
Deputy Clerk.

Date: October 7, 1948. [31]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 14th day of October, 1948, I received the within summons and on October 19, 1948, served the Central Avenue Dairy, Inc., by delivering to Edwin G. Geare, President of Company, copy of Summons with attached copy of Complaint in Interpleader and Order of Injunction and for Process and showing him the origi-

nal Summons at 10:15 a.m. at the Central Avenue Dairy, 3104 North Central Ave., Phoenix, Arizona.

Marshal's Fees: Travel, \$.24; Service, \$2.00; Total \$2.24.

B. J. McKINNEY,

United States Marshal,

By /s/ M. CASSIE BAKER,

Deputy United States Marshal.

[Endorsed]: Filed Nov. 3, 1948. [32]

At a stated term, to wit: The September Term. A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 8th day of November, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable: Ben Harrison, District Judge.

[Title of Cause.]

For hearing order to show cause why injunction should not be made permanent, and why decree should not be made discharging plaintiff from liability;

Arch H. Vernon, Esq., appearing as counsel for plaintiff, makes a statement that the money is now on deposit in the Registry of the Court.

Guy B. Graham, Esq., appearing as counsel for Defendant Hagan only, states no objection to granting motion of plaintiff.

Court grants permanent injunction and discharges plaintiff from liability in this cause. Attorney Graham makes a statement re cross-complaint, and Court allows cross-defendant Central Avenue Dairy to Nov. 22, 1948, to answer cross-complaint of Defendant Hagan. [33]

In the District Court of the United States, Southern
District of California, Central Division

Civil—No. 8741-BH

TITLE INSURANCE AND TRUST COMPANY,
a corporation,

Plaintiff,

vs.

EVERT HAGAN, doing business as EL REY
CHEESE CO., and CENTRAL AVENUE
DAIRY, INC., a corporation,

Defendants.

DECREE

The above-entitled action duly came on for hearing in the above-entitled Court before the Honorable Ben Harrison, Judge of said Court, on the 8th day of November, 1948, upon the Order of Injunction and for Process herein dated October 7, 1948, requiring defendants, and each of them, to show cause why the injunction heretofore granted should not be made permanent and why a decree should not be made discharging plaintiff from any and all liability to said defendants, or any or either of them;

Arch. H. Vernon, Lawrence L. Otis and Gilbert E. Harris, by Arch. H. Vernon, Esq., appearing for plaintiff; and

Guy B. Graham, Esq., appearing for defendant Evert L. Hagan, doing business as El Rey Cheese Company;

There being no appearance on the part of defendant Central [34] Avenue Dairy, Inc., a corporation; and

It appearing that the Summons and Complaint herein and Order of Injunction and for Process, dated October 7, 1948, had been duly served upon the defendant Central Avenue Dairy, Inc., a corporation, and that said defendant has not answered the complaint herein nor appeared herein; and

It appearing from the pleadings filed herein that the allegations contained herein are, and each of said allegations is, true; and the Court being fully advised in the premises;

It Is Ordered and Decreed:

That said defendants and their representative Attorneys, agents, or representatives, or any or either of them, be, and hereby are, forever enjoined from instituting or prosecuting any suit or proceeding in any State Court or in any United States Court on account of the money described in the complaint herein.

That plaintiff be, and hereby is, forever discharged from any and all liability to said defendants, or any or either of them, on account of said money described in the complaint herein, to wit, the sum of \$1750.00

deposited by plaintiff in the Registry of this Court to abide the further order of the Court herein.

Dated November 15, 1948.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed Nov. 15, 1948. [35]

[Title of District Court and Cause.]

NOTICE OF MOTION TO QUASH AND SET
ASIDE ATTEMPTED SERVICE OF PROC-
ESS AND TO QUASH AND SET ASIDE AT-
TEMPTED SERVICE OF ANSWER, CLAIM
AND CROSS - COMPLAINT OF DEFEND-
ANT-CLAIMANT EVERT L. HAGAN.

To Evert L. Hagan, Doing Business as El Rey Cheese Company, Defendant and Claimant, and to Guy B. Graham, Esq., His Attorney, 115 N. Eastern Avenue, Los Angeles 22, California; and Title Insurance and Trust Company:

You, and Each of You, will please take notice that Central Avenue Dairy, Inc., a corporation, by its attorneys, Bodkin, Breslin & Luddy, hereby appears specially in this action for the purpose of this motion only, and that said Central Avenue Dairy, Inc., so specially appearing by its attorneys, will move the above-entitled court in Court Room 6 of said Court, before the Hon. Benjamin Harrison, Judge of said District Court, on Monday, December 6, 1948, at the hour of 10:00 o'clock a.m., of said day to quash and set aside the attempted service of process and to

quash and set aside the attempted service of the answer, claim and [36] cross-complaint of defendant claimant Evert L. Hagan upon defendant Central Avenue Dairy, Inc.

That said motion will be made on the following grounds:

1. The delivery of a copy of the answer, claim and cross-complaint of defendant claimant Evert L. Hagan to R. William Kramer on November 9, 1948, or at any other time, as agent appointed pursuant to the laws of the State of Arizona, to receive service of process on behalf of defendant Central Avenue Dairy, Inc., an Arizona corporation, at the City of Phoenix, Maricopa County, State of Arizona, said City of Phoenix, in the State of Arizona, being outside of the Federal District and outside of the state in which the above-entitled court is held, and no copy of the summons upon the cross-complaint being attached to or delivered with said answer, claim and cross-complaint, was not sufficient to vest the above-entitled court with jurisdiction over the person of defendant Central Avenue Dairy, Inc.

2. The delivery of a copy of the answer, claim and cross-complaint of defendant claimant Evert L. Hagan to R. William Kramer personally on November 9, 1948, as the agent appointed pursuant to the laws of the State of Arizona to receive process on behalf of defendant Central Avenue Dairy, Inc., an Arizona corporation, at the City of Phoenix, Maricopa County, State of Arizona, at which time no copy of the summons on the cross-complaint was attached to or served with said answer, claim and cross-com-

plaint, said defendant Central Avenue Dairy, Inc., not having made a general or special appearance in said action prior to the delivery of a copy of such answer, claim and cross-complaint to said R. William Kramer was not sufficient to vest the above-entitled court with jurisdiction over the person of the defendant Central Avenue Dairy, Inc.

3. That the mailing on October 30, 1948, of a copy of the answer, claim and cross-complaint of defendant claimant Evert L. [37] Hagan to Kramer, Morrison, Roche & Perry at the City of Phoenix, County of Maricopa, State of Arizona, as the alleged attorneys for defendant Central Avenue Dairy, Inc., said defendant not having theretofore made a general or special appearance in said action and no copy of the summons on the cross-complaint having been attached to or mailed with said answer, claim and cross-complaint was not sufficient to vest the above-entitled court with jurisdiction over the person of defendant Central Avenue Dairy, Inc.

That said motion will be made upon the affidavits of Ed A. Geare and R. William Kramer served and filed herewith and upon the files, records and papers in the above-entitled action.

Dated: November 22, 1948.

BODKIN, BRESLIN & LUDDY,
By /s/ HENRY G. BODKIN,
Attorneys for defendant,
Central Avenue Dairy, Inc.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 22, 1948. [38]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
QUASH AND SET ASIDE ATTEMPTED
SERVICE OF PROCESS AND TO QUASH
AND SET ASIDE ATTEMPTED SERVICE
OF ANSWER, CLAIM AND CROSS - COM-
PLAINT.

District of Arizona,
County of Maricopa—ss.

Ed A. Geare, being first duly sworn, upon oath de-
poses and says:

That he is President and General Manager of Cen-
tral Avenue Dairy, Inc., a corporation; that said
Central Avenue Dairy, Inc., is a corporation organ-
ized and existing under the laws of the State of Ari-
zona, having its principal place of business in the
City of Phoenix, Maricopa County, Arizona, and that
said Central Avenue Dairy, Inc., was incorporated
under the laws of the State of Arizona on the 24th
day of May, 1926;

Affiant further states that said defendant Central
Avenue Dairy, Inc., has never done any intrastate
business in the State of [40] California; that it never
did, and does not now, have any agent in the State
of California; that it has never maintained an office
in said State of California; and that any business
which it may have had in said State of California
was wholly interstate in its nature;

That at no time prior to the date hereof has de-
fendant Central Avenue Dairy, Inc., a corporation,

made any general or special appearance in the above-entitled action.

/s/ ED A. GEARE.

Subscribed and sworn to before me this 19th day of November, 1948.

(Seal) /s/ AMY SWEEN,
Notary Public in and for said County and State.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 22, 1948. [41]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO
QUASH AND SET ASIDE ATTEMPTED
SERVICE OF ANSWER, CLAIM AND
CROSS-COMPLAINT.

District of Arizona,
County of Maricopa—ss.

R. William Kramer, being first duly sworn, deposes and says:

That he is an attorney at law duly licensed to practice in all of the courts of the State of Arizona and is a member of the law firm of Kramer, Morrison, Roche & Perry with offices at Phoenix, Arizona, and that at all times hereinafter mentioned the affiant was, and now is, a resident of the County of Maricopa, State of Arizona; that on November 9, 1948, the United States Marshal for the United States District Court of Arizona, acting by and through one of

his authorized deputies delivered to your affiant at the City of Phoenix, County of Maricopa, State of Arizona, United States District Court of Arizona, outside of the District of the United States for the Southern District of California, Central Division, as statutory agent for the Central Avenue Dairy, Inc., in the State of Arizona, one copy only of the answer, claim and cross-complaint of defendant claimant Evert L. Hagan in the above-entitled action, which action is pending in the District Court of the United States, for the Southern District of California, Central Division, and that the said defendant Central Avenue Dairy, Inc., had not on November 9, 1948, or at any time prior thereto, made any general or special appearance in said action and that there was not attached to or delivered with said copy of the answer, claim and cross-complaint any copy of a summons on the cross-complaint;

That affiant is informed and believes and therefore alleges that the United States District Court for the Southern District of California, Central Division, acquired, and has, no jurisdiction whatever over Central Avenue Dairy, Inc., which is a corporation organized and existing under and by virtue of the laws of the State of Arizona; that Central Avenue Dairy, Inc., has no agent or agents in the State of California, nor is it doing any business whatsoever in said State;

That there was no copy of the summons on the cross-complaint attached to the copy of the said answer, claim and cross-complaint which was mailed to

the law firm of Kramer, Morrison, Roche & Perry on October 30, 1948;

Wherefore, affiant prays that an order be made quashing and setting aside the attempted service of the answer, claim and cross-complaint of defendant Evert L. Hagan upon defendant [44] Central Avenue Dairy, Inc., in the above action, for the reasons specified in the foregoing portions of this affidavit.

/s/ R. WILLIAM KRAMER.

Subscribed and sworn to before me this 19th day of November, 1948.

(Seal) /s/ GENE GLADNEY,

Notary Public in and for said County and State.

My commission expires July 23, 1949.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 22, 1948. [45]

In the District Court of the United States for the
Southern District of California, Central Division

File No. 8741-BH

TITLE INSURANCE & TRUST CO., a corpora-
tion,

Plaintiff,

vs.

EVERT HAGAN, dba El Rey Cheese Company, and
CENTRAL AVENUE DAIRY, INC., a corpora-
tion,

Defendants-Claimants.

JUDGMENT OF DISMISSAL

The motion of defendant Central Avenue Dairy, Inc., to quash and set aside the attempted service of process and to quash and set aside the attempted service of answer, claim and cross-complaint of defendant Evert L. Hagan, came on regularly to be heard before the Honorable Ben Harrison, Judge of the above-entitled Court, on December 20, 1948, the said Evert L. Hagan appearing by his counsel, Guy B. Graham, Esq., and George W. Rochester, Esq., and Central Avenue Dairy, Inc., appearing by its counsel Henry G. Bodkin, Esq., of Bodkin, Breslin & Luddy, and the Court having heard the argument of counsel and the matter having been heretofore submitted and the Court being fully advised in the premises, does hereby find that said motion should be granted and said cross-complaint dismissed for lack

of jurisdiction of the defendant [47] Central Avenue Dairy, Inc., an Arizona corporation;

Wherefore, It Is Hereby Ordered, Adjudged and Decreed that the said motion be, and the same is hereby granted and said cross-complaint of defendant Evert L. Hagan against defendant Central Avenue Dairy, Inc., is hereby dismissed for lack of jurisdiction of defendant Central Avenue Dairy, Inc., an Arizona corporation.

Done This 31st day of Dec., 1948.

/s/ BEN HARRISON,
District Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 31, 1948. [48] .

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT OF
DISMISSAL

To Title Insurance & Trust Co., and to Arch H. Vernon, Its Attorney; and to Evert L. Hagan, Doing Business as El Rey Cheese Company, and to Messrs. Guy B. Graham and George W. Rochester, His Attorneys:

You, and Each of You, will please take notice that the judgment of dismissal of the cross-complaint of Evert L. Hagan, doing business as El Rey Cheese Company, against the defendant Central Avenue Dairy, Inc., an Arizona corporation, was entered De-

ember 31, 1948, in Civil Order Book 55 at page 44 of the above-entitled Court.

Dated: January 5, 1949.

BODKIN, BRESLIN & LUDDY,

By /s/ G. STUART SILLIMAN,

Attorneys for defendant Central Avenue Dairy, Inc.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 6, 1949. [50]

In the District Court of the United States for the
Southern District of California, Central Division

File No. 8741-BH

TITLE INSURANCE AND TRUST COMPANY,
a corporation,

Plaintiff,

vs.

EVERT L. HAGAN, doing business as El Rey
Cheese Company, and Central Avenue Dairy,
Inc., a corporation,

Defendants.

CIVIL INTERPLEADER ACTION — JUDG-
MENT RE MONEYS DEPOSITED IN IN-
TERPLEADER

That the above-entitled action was filed by the plaintiff under the act approved January 25, 1948, Chapter 646 Public Law 773, Laws of the 80th Congress, 2nd Session; U. S. Code Title 28, Section 1335.

That in connection therewith the plaintiff deposited with this court the sum of \$1750.00 and that the plaintiff made no claim to said sum and requested that the said sum be disbursed to the person legally entitled thereto;

That process was issued by the court directed to the defendants and was duly and regularly served on each of said defendants;

That the defendant Evert L. Hagan filed an answer to plaintiff's complaint and a claim for the moneys deposited in court [52] and further a cross-complaint against the defendant Central Avenue Dairy, Inc., seeking other affirmative relief;

That the defendant Central Avenue Dairy, Inc., failed to answer the plaintiff's complaint and that upon November 15, 1948, this court made a decree enjoining the defendants and either of them from executing or prosecuting any suit or proceedings in any State or U. S. Court on account of moneys described in the complaint and deposited by plaintiff, and discharging plaintiff from any and all further liability in connection with said matter, and further providing that said moneys remain on deposit subject to further order of the Court herein;

Thereafter the defendant Central Avenue Dairy, Inc., appeared specially in the above-entitled action and made no claim to the moneys deposited in said action but moved the court to quash and set aside the attempted service of process and attempted service of the answer, claim and cross-complaint of the defendant, Evert L. Hagan.

That thereafter this Court granted judgment upon

such motion, adjudging that the cross-complaint of the defendant Evert L. Hagan against the defendant Central Avenue Dairy be dismissed for lack of jurisdiction of the defendant Central Avenue Dairy, Inc.

That judgment of dismissal was entered on December 31, 1948, in Civil Order Book 55, Page 44.

That notice of appeal from said judgment of dismissal was filed on January 7, 1949, for and in behalf of the defendant and cross-complainant, Evert L. Hagan. That no appeal has been taken from the decree of this Court of November 15, 1948, and that the time for the taking of any such appeal and for filing of notice of appeal from said decree has expired.

That said sum of \$1750.00 still remains upon deposit with the said Court and that the defendant Evert L. Hagan is the only party who has laid claim to said sum, and [53]

It Appearing that there is no just reason for delay in the disbursement of said sum to said defendant Evert L. Hagan pending his appeal upon and from order of dismissal of his cross-complaint against the defendant Central Avenue Dairy, Inc., and

It Further Appearing that judgment should be made and entered disbursing said sum of \$1750.00 to said Evert L. Hagan at this time;

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed:

That the default of the defendant Central Avenue Dairy, Inc., to the complaint filed herein and process issued and served thereon be entered forthwith.

That the sum of \$1750.00 on deposit with this court

in this action be immediately paid to the said defendant, Evert L. Hagan herein.

The Clerk of this Court Is Hereby Ordered to immediately enter this judgment.

It Is Hereby Adjudged that there is no just reason for delay in the granting of this judgment or for its entry by the Clerk of this Court.

Judgment Is Granted and Directed to Be Entered Without Prejudice to the Appeal Now Pending on Behalf of the Defendant Evert L. Hagan from the judgment of dismissal of the cross-complaint, said judgment having been entered on December 31, 1948, in Civil Order Book 55 at page 44 of the above-entitled Court.

Dated February 15th, 1949.

/s/ BEN HARRISON,
Judge of the United States District Court.

Judgment entered Feb. 15, 1949.

[Endorsed]: Filed Feb. 15, 1949. [54]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Central Avenue Dairy, Inc., and Bodkin-Breslin & Luddy, its Attorneys:

You and Each of You Take Notice, that the claimant and defendant, Evert L. Hagan, does hereby appeal to the United States Circuit Court of Appeals

for the Ninth Circuit, from the Orders and Judgment of the above-entitled Court in the above-entitled Action and all proceedings therein.

Dated: January 3, 1949.

/s/ GUY B. GRAHAM,
Attorney for Defendant Evert L. Hagan.

(Duly Verified.)

(Affidavit of Service by Mail attached.)

Endorsed: Filed Jan. 7, 1949. [55]

[Title of District Court and Cause.]

EXTENSION OF TIME

Good cause appearing therefore, it is hereby,

Ordered:

That the defendant, claimant, cross-complainant and appellant, Evert L. Hagan, may have up to and including the 2nd day of April, 1949, to file with the Clerk of the Circuit Court of Appeals, the record on appeal and said appeal to be docketed in said Court.

Dated: This 9th day of February, 1949.

/s/ PAUL J. McCORMICK,
Judge of the United States District Court.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 9, 1949. [57]

[Title of District Court and Cause.]

STIPULATION RESPECTING CASH
DEPOSIT IN LIEU OF BOND

Evert L. Hagan, defendant, claimant, cross-complainant and appellant in the above-entitled action, hereby and herewith deposits with the Clerk of the above-entitled court, in lieu of furnishing a personal surety bond as required by Rule 73 (c) of the Federal Rules of Civil Procedure, cash, in the sum of Two hundred fifty and no/100 (\$250.00) Dollars, and hereby stipulates, consents and agrees that said sum of Two hundred fifty and no/100 (\$250.00) Dollars, shall be and constitute the bond of appellant for costs on appeal as required by law and that the same shall secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of [59] such costs as the Appellate Court may award if the judgment is modified. Said defendant and cross-claimant, stipulates, consents and agrees that in the case of default or contumacy on the part of said defendant and cross-claimant or his attorney, the court may upon notice to said defendant and cross-claimant of not less than 10 days, proceed summarily and render judgment against said defendant and cross-claimant in accordance with his obligation hereunder and award execution thereon.

Witness my hand and seal this 21st day of February, 1949.

/s/ EVERT L. HAGAN,

Defendant, claimant, cross-complainant and appellant.

State of California,
County of Los Angeles—ss:

On this 21st day of February, 1949, before me, Rita Finn, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Evert L. Hagan, known to me to be the person whose name is subscribed to the within Stipulation and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) /s/ RITA FINN,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires Feb. 18, 1952.

Approved:

/s/ BEN HARRISON,
Judge.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 21, 1949. [60]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

By way of preface it should be stated that a default judgment was granted claimant Evert L. Hagan upon his claim filed herein to the funds deposited

in interpleader. This appeal does not involve this default judgment, but only the order of the District Court refusing to entertain the cross-claim or cross-complaint. The Point on appeal is:

In an interpleader action filed under the Act approved January 25, 1948, Chapter 646, Public Law 773, Laws of the 80th Congress, Second Session; United States Codes, Title 28, Section 1335, wherein the court has obtained jurisdiction [62] of both claimants, and interpleader is adjudged to be proper, may the court entertain a cross-claim or cross-complaint by the claimant resident in the state where the court is sitting against the non-resident claimant, where the cross-claim or cross-complaint was served and filed by the resident claimant upon the nonresident claimant, when the cross-claim or cross-complaint involves a claim for damages, in addition to the claim for the fund deposited in interpleader, when the claim for the fund deposited, and the claim for damages arise from and are based upon an alleged breach of the same contract?

Dated: February 21, 1949.

/s/ CHARLES WILLIAMS,

Attorney for defendant, claimant, cross-complainant
and appellant Evert L. Hagan.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 21, 1949. [63]

[Title of District Court and Cause.]

REQUEST AND DESIGNATION OF
PORTIONS OF RECORD FOR
APPEAL

The defendant, claimant, cross - complainant and appellant, Evert L. Hagan, having filed notice of appeal from the judgment of Dismissal filed in the above-entitled action upon December 31, 1948, hereby requests that the Clerk of the above-entitled Court prepare and certify the following portions of the record as the record on appeal and transmit a true copy of the following:

The complaint in interpleader.

Deposit of money in interpleader receipt.

Motion to issue summons and order thereon of Oct. 7, 1948.

Order of injunction and for process of Oct. 7, 1948.

Answer, claim and cross-complaint of Evert L. Hagan.

Summons issued to Central Avenue Dairy, Inc., and return of service thereon. [65]

Order making injunction permanent.

Minute Order permitting cross-defendant Central Avenue Dairy, Inc., to answer, dated November 8, 1948.

Decree dated November 15, 1948.

Notice of Motion of Central Avenue Dairy, Inc., to quash and set aside service filed November 22, 1948.

Affidavits in support of motion to quash and set aside service.

Judgment of Dismissal filed December 31, 1948.

Notice of Entry of Judgment.

Notice of Appeal.

Return of Writ, Service of Answer, Claim, Cross-complaint on Kramer, Morrison, Roche and Perry.

Judgment re monies deposited in interpleader.

Cost Bond on Appeal.

Designation of portions of record for appeal.

Statement of Points on Appeal.

Dated: February 21, 1949.

/s/ CHARLES WILLIAMS,

Attorney for defendant, claimant, cross-complainant
and appellant, Evert L. Hagan.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed February 21, 1949. [66]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 67, inclusive, contain the original Complaint in Interpleader; Deposit; Motion; Order of Injunction and for Process; Answer, Claim and Cross-Complaint of Defendant-Claimant, Evert L. Hagan; Summons and Return of Service; Decree; Notice of Motion to Quash and Set Aside Attempted Service of Process and to Quash and Set Aside Attempted Service of Answer, Claim and Cross-Complaint of Defendant-Claimant Evert L. Hagan; Affidavits of Ed A. Geare and R. William Kramer in Support of Motion to Quash, etc.; Judgment of Dis-

missal; Notice of Entry of Judgment of Dismissal; Judgment re Moneys Deposited in Interpleader; Notice of Appeal; Order Extending Time to Docket Appeal; Stipulation Respecting Cash Deposit in Lieu of Bond Statement of Points on Appeal and Designation of Record on Appeal and a full, true and correct copy of Minute Order Entered November 8, 1948, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 22nd day of March, A.D. 1949.

(Seal)

EDMUND L. SMITH,
Clerk.

[Endorsed]: No. 12211. United States Court of Appeals for the Ninth Circuit. Evert L. Hagan, doing business as El Rey Cheese Co., Appellant. vs. Central Avenue Dairy, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 24, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Civil Interpleader Action

No. 12211

EVERT L. HAGAN,

Appellant,

vs.

CENTRAL AVENUE DAIRY, INC., a corporation,
Respondent.

STATEMENT OF POINTS ON APPEAL

By way of preface it should be stated that a default judgment was granted claimant Evert L. Hagan upon his claim filed herein to the funds deposited in interpleader. This appeal does not involve this default judgment, but only the order of the District Court refusing to entertain the cross-claim or cross-complaint. The Points on Appeal are:

1. In an interpleader action filed under the Act approved January 25, 1948, Chapter 646, Public Law 773, Laws of the 80th Congress, Second Session, United States Codes, Title 28, Section 1335, wherein the Court has obtained jurisdiction of both claimants, and interpleader is adjudged to be proper, may the Court entertain a cross-claim or cross-complaint by the claimant resident in the state where the Court is sitting against the non-resident claimant, where the cross-claim or cross-complaint was served and filed by the resident claimant upon the non-resident claimant, when the cross-claim or cross-complaint in-

volves a claim for damages, in addition to the claim for the fund deposited in interpleader, when the claim for the fund deposited, and the claim for damages arise from and are based upon the same breach of the same contract?

2. Appellant contends that the District Court having once obtained jurisdiction of the non-resident Central Avenue Dairy, Inc., for the purposes of interpleader, had jurisdiction to adjudicate cross-claims between claimants which were germane to the issues involved in the interpleader.

3. The District Court erred in ruling it could not entertain a cross-claim by the resident claimant against the non-resident claimant where the cross-claim arose out of the same breach of the same contract that the deposit in the interpleader and the conflicting claims thereto arose.

4. The District Court erred in dismissing a cross-claim where the two claimants are before the Court in interpleader and the deposit is claimed by one claimant by virtue of a breach of a contract, and the same claimant also claims damages by way of cross-claim for the same breach of the same contract.

Dated: April 14th, 1949.

/s/ CHARLES WILLIAMS,
Attorney for Defendant, Claimant, Cross-Claimant
and Appellant Evert L. Hagan.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 16, 1949. Paul P. O'Brien,
Clerk.

No. 12211

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

EVERT L. HAGAN,

Appellant,

vs.

CENTRAL AVENUE DAIRY INC.,

Respondent.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the
Southern District of California, Central Division

FILED

JUN 4 - 1949

PAUL H. O'BRIEN,
CLERK

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**In the
United States
Circuit Court of Appeals
For the Ninth Circuit**

EVERT L. HAGAN,

Appellant,

vs.

CENTRAL AVENUE DAIRY INC.,

Respondent.

No. 12211

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the
Southern District of California, Central Division

STATEMENT OF FACTS

The original action in this case was statutory interpleader brought under the Act approved January 5, 1948, Chapter 646, Public Law 773, Laws of the 80th Congress, 2nd Session, U. S. Code, Title 28, Section 1335.

In the original complaint filed by the Title Insurance & Trust Company it was alleged that the Title Insurance & Trust Company was escrow holder of the sum of \$1750 deposited by Evert L. Hagan in an escrow agreement between Evert L. Hagan and the

Central Avenue Dairy Inc.; that the Central Avenue Dairy was a resident of the State of Arizona, and Evert L. Hagan was a resident of California; that said amount was in excess of \$500, and that Evert L. Hagan and Central Avenue Dairy Inc., had presented conflicting claims to the Title Insurance & Trust Company for the said fund; that the Title Insurance & Trust Company in order to escape the possibility of dual liability prayed that interpleader be adjudged, that it be allowed to deposit the \$1750 into the registry of the Court and be discharged from liability on account of said escrow agreement; and that Evert L. Hagan and the Central Avenue Dairy be enjoined from prosecuting any claim relating to said escrow agreement in any other court, state or federal.

The Central Avenue Dairy Inc., and Evert L. Hagan were served by the United States Marshal in Arizona and California respectively, with process and an order to show cause why the injunction prayed for by the Title Insurance & Trust Company should not be made permanent. The Central Avenue Dairy Inc., failed to appear to show cause why the injunction should not be permanent. Evert L. Hagan appeared and assented to the adjudication of interpleader. He also filed an answer claiming the \$1750 fund deposited alleging that the fund had been deposited by Evert L. Hagan in order to secure the performance of a certain contract entered into between Evert L. Hagan and the Central Avenue Dairy under the date of November 8, 1938. Evert L. Hagan further alleged

that the contract provided for the sale and delivery by the Central Avenue Dairy to Evert L. Hagan of cheese products at specified prices; that the Central Avenue Dairy had breached the said contract by refusing to deliver to Evert L. Hagan in accordance with its terms. The Central Avenue Dairy Inc., was alleged to have prevented the performance by Evert L. Hagan of his side of the contract and had thereby waived all rights of payment in the manner provided for in the contract, and that therefore Evert L. Hagan was entitled to the said \$1750.00. Along with this answer, Evert L. Hagan filed a cross claim or cross complaint, alleging that by virtue of the same breaches of the same contract, which he alleged gave him the right to claim the fund deposited, that he had been damaged in the amount of \$200,000.00 and prayed the Court to render him damages in this amount, plus his costs. After the District Court had entered the default order making the injunction heretofore referred to permanent, the Central Avenue Dairy appeared specially and moved to quash and set aside the service of the answer, claim and cross complaint of Evert L. Hagan, for the reason that such service was made outside the Federal District and State wherein the Court was sitting, and because no summons was delivered with the said Answer, Claim and Cross Complaint. The record will show that said answer, claim and cross complaint was served twice, once by registered mail to the statutory agent of the Central

Avenue Dairy, and secondly by service through a United States Marshal upon the President of the Central Avenue Dairy Inc.

The district Court dismissed the cross complaint for the reason that it found there was a lack of jurisdiction of the defendant, Central Avenue Dairy Inc., to entertain the cross complaint. Appellant Evert L. Hagan appeals from said order of dismissal of said cross complaint.

APPELLANT'S CONTENTION AND STATEMENT OF POINTS ON APPEAL

By way of preface it should be stated that a default judgment was granted claimant Evert L. Hagan upon his claim filed herein to the funds deposited in interpleader. This appeal does not involve this default judgment, but only the order of the District Court refusing to entertain the cross claim or cross complaint. The Points on Appeal are:

1. In an interpleader action filed under the act approved January 25, 1948, Chapter 646, Public Law #773, Laws of the 80th Congress, Second Session, United States Codes, Title 28, Section 1335, wherein the Court has obtained jurisdiction of both claimants, and interpleader is adjudged to be proper, may the Court entertain a cross claim or cross complaint made by the claimant resident in the State where the Court

is sitting, against the non-resident claimant, where the cross claim or cross complaint was served and filed by the resident claimant upon the non-resident claimant, when the cross claim or cross complaint involved a claim for damages in addition to the claim for the fund deposited in interpleader, when the claim for the fund deposited and the claim for damages arise from and are based upon the same breach of the same contract.

2. Appellant contends that the District Court, having once obtained jurisdiction of the non-resident Central Avenue Dairy Inc., for the purposes of interpleader, had jurisdiction to adjudicate cross claims between claimants which were germane to the issues involved in the interpleader.
3. The District Court erred in ruling it could not entertain a cross claim by the resident claimant against the non-resident claimant where the cross claim arose out of the same breach of the same contract that the deposit in the interpleader and the conflicting claims thereto arose.
4. The District Court erred in dismissing a cross claim where the two claimants are before the Court in interpleader and the deposit is claimed by one claimant by virtue of a breach of a contract, and the same claimant also claims damages by way of cross claim for the same breach of the same contract.

POINTS AND AUTHORITIES

I.

THERE WAS JURISDICTION OF THE DISTRICT COURT IN LOS ANGELES TO ENTERTAIN THE INTERPLEADER ACTION AND ISSUE PROCESS ANYWHERE IN THE UNITED STATES.

Chapter 646, Public Law 773, Laws of the 80th Congress, 2nd Session, U. S. Code, Title 28, Sec. 1335.

II.

THE COURT, HAVING OBTAINED JURISDICTION TO DECIDE THE INTERPLEADER, SHOULD DETERMINE ALL CONTROVERSIES BETWEEN THE CLAIMANTS, WHICH ARE GERMANE TO THE ISSUES, AND WHICH CAN BE DECIDED WITHOUT PREJUDICE TO THE RIGHTS OF OTHERS.

Providence Sav. & Loan v. Booth (Neb.), 138 Neb. 424, 293 N. W. 293;

Seattle v. Turner, Wash., 29, 51569 P. 1083;

Irwin v. Ratliff, 94 Ind. 583.

III.

NO SUMMONS WAS NECESSARY IN SERVING THE CROSS COMPLAINT

Rules of Federal Procedure 5(a); 4(d)3, and Rule 4F.

“5(a) Every order required by its terms to be served, EVERY PLEADING SUBSEQUENT TO THE ORIGINAL COMPLAINT unless the Court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear EXCEPT THAT PLEADINGS ASSERTING NEW OR ADDITIONAL CLAIMS for relief against them shall be SERVED upon them in the MANNER PROVIDED FOR SERVICE OF SUMMONS IN RULE 4.”

“4(d)(3). Upon a domestic or FOREIGN CORPORATION or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process, and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.” (Capitals ours.)

“4(f) All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.”

Process embraces all steps and proceedings in a cause from its commencement to its conclusion.

U. S. v. Murphy, 82 F. 893.

“Neither is process” (used here to cover necessity for summons) “upon a counterclaim necessary to bring in the plaintiff or a co-defendant. Several cases may be noted which have dicta that the same process is necessary on a counter claim as on an original complaint, but on the facts involved they do not lay down rules for federal practice.”

CYCLOPEDIA OF FEDERAL PROCEDURE (2d Ed.) Vol. 4, P. 85, where authorities are cited.

HUGHES FEDERAL PRACTICE JURISDICTION AND PROCEDURE, Vol. 17, (1940 Ed.) P. 226, in discussing the interpretation of Rule 5(a) and Rule 4, says:

“After all, if service of the original complaint and summons has been properly made under the provisions of Rule 4, the Court already has jurisdiction over him, regardless of the fact of his appearance or non-appearance, and the Court should be allowed to exercise that jurisdiction in connection with anything relating to the case and arising be-

cause of it. This seems to be the logical meaning of the rule and the one best qualified to do justice between the parties with the minimum expenditure of time and money.”

IV.

THE COURT, HAVING ONCE OBTAINED JURISDICTION OF THE PARTIES, SHOULD DO COMPLETE JUSTICE BETWEEN THEM.

In the case of *Mathis v. Ligon*, 39 Fed. (2) 455, C. C. A. 10th Circuit, 1930, it is said (L. C. 456):

“The second proposition is predicated upon the contention that the Court was without jurisdiction of the counter claim filed by Mathis against his co-defendants and against Maceo Rains. The counter claim developed from what was formerly known in equity practice as a cross bill. It involved the validity of a resale tax deed and the title, if any, which passed to Mathis by virtue thereof, and by which Mathis sought to establish affirmatively the validity of such resale tax deed and his title thereunder, as against Maceo Rains and his co-defendants. In his original bill of complaint Maceo Rains contended as an issue the question of the validity of such tax deed and the title of Mathis thereunder. A cross bill is a pleading by the defendant in a suit against the plaintiff in the same suit or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It must be either in aid of a defense to the original bill or

to obtain full relief to all parties touching the matters in the original bill. *Oregon Co. v. Peck Bentley Ry.*, 137 U. S. 171, 11 Sup. Ct. 61; 34 L. Ed. 625; *Landon v. Pub. Ut. Co.*, (D. C.) 234 Fed. 152; 21 C. J. 498, Section 597. Such a cross bill is ancillary to the original bill and if the court has jurisdiction of the case made by the original bill, it has jurisdiction of a defendant cross bill. *Wrigley Land Co. v. Miller & Look*, 218 U. S. 258; 31 Sup. Ct. 11; 54 L. Ed. 1032; *R. R. Co. v. Canlin*, 6 Wall 748; 18 L. Ed. 859; *Osborne & Co. v. Barg* (D. C.) 30 Fed. 805; *1st Natl. Bank of Salem v. Salem Capitol Flour Mills* (D. C.) 31 Fed. 580; *Freeman v. Howe*, 24 Howard 450, 16 L. Ed. 749; *Brooks v. Laurent* (D. C.) 98 Fed. 647. Since the court had jurisdiction of the case made by the original bill in the instant case it had jurisdiction of the cross bill which was a germane ancillary proceeding."

In *Barnett v. Mays*, 43 Fed. (2) 521, it was held that a court having acquired jurisdiction to settle part of a controversy presented for determination, has power and authority to determine the entire controversy.

In *Jones v. St. Paul Fire & Marine Ins. Co.*, 108 Fed. (2) 123, it is held that the new rules of civil procedure for district courts insist and require that all claims growing out of a single transaction be brought and settled in one civil action, the fact that one claim alone involves less than \$3000 is no obstacle if controversy as a whole involved that much and jurisdic-

tion once acquired lasts until the court finishes with all parts of the controversy. Citing *Rules of Federal Procedure for District Court*, Rules 13D and 15B and 18A; 28 U. S. Code annotated, following section 723B.

The case of *Sun Oil Co. v. Hereford*, 130 Fed. (2) 10, held that when a Federal Court has jurisdiction of a controversy on the ground of diversity of citizenship it has the power to decide all issues arising therein under the laws of any state in accordance with the statutes of that state, and the same rule applies where Federal jurisdiction attaches solely by reason of a federal question.

In the case of *El Paso and S. W. R. Co. v. Arizona Corp. Com.*, 51 Fed. (2) 573 (District Court 1931) it was held that equity jurisprudence recognizes the propriety of cross bills following the rule that a court of equity has jurisdiction of all cross or counter claims growing out of and germane and ancillary to plaintiffs cause of action, even though they could not be pleaded as independent suits within the federal jurisdiction.

See also

U. S. v. Pryor, 2 F. R. S. 179;

Sherman Natl. Bank v. Schubert Theat. Co.,
238 Fed. 225; 247 Fed. 256.

Appellant calls particular attention to *U. S. ex rel. Foster Wheeler Corp. v. American Surety Co.*, 25 Fed. Supp. 700, which said:

“While it is true that because of lack of diversity of citizenship, the intervening defendant could

not sue the plaintiff in this court on the facts alleged in its counterclaim, if those facts were set forth in an independent suit, yet this fact does not deprive this court of jurisdiction. THE MAIN ACTION IS BROUGHT UNDER A STATUTE OF THE UNITED STATES. (Capitals ours.) To this complaint must be set up all counter claims arising out of the same transaction. Rule 13A of the Rules of Civil Procedure, 28 U. S. C. A. following Section 723C. Under such circumstances no independent jurisdiction is necessary for the assertion of the counter claim. *Moore v. New York Cotton Exchange*, 270 U. S. 593; 46 S. Ct. 367, 70 L. Ed. 750, 45 A. L. R. 1370; *Moore, Federal Practice*, page 686.”

V.

INTERPLEADER IS OF AN EQUITABLE NATURE AND EQUITY FROWNS UPON MULTIPLICITY OF ACTIONS.

Kalo Inoculast v. Seeds Co., 161 F. 981;
Trico Products v. Anderson, 147 F. 721.

VI.

RULE 13g OF THE FEDERAL RULES OF PROCEDURE SHOWS THE PROPRIETY OF SETTLEMENT OF ALL GERMANE ISSUES IN A SINGLE ACTION IN ORDER TO AVOID A DETERMINATION OF ONE PART OF A CONTROVERSY, AND THEN RELEGATE THE LITIGANT TO ANOTHER FORUM FOR COMPLETE RELIEF.

Rule 13g provides:

“A pleading may state as a cross claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim, therein, or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that the party against whom it is asserted is, or may be liable to the cross claimant for all or part of a claim asserted in the action against the claimant.”

As was said in *Carter Oil Co. v. Wood*, 30 Fed. Supp. 887:

“ . . . to justify adjudication of a counterclaim it was only essential that it be of a character making it necessary to realization of complete justice as to the subject matter of the original cause of action. Thus it has been repeatedly held that where the court has jurisdiction of a complaint seeking to protect property rights and a defend-

ant claims a superior right therein not only as against the plaintiff but as against co-defendants, a cross bill to that effect will be sustained even though as between the parties thereto, diversity of citizenship does not exist. *Craig v. Dorr*, (4 Cir.); 145 F. 307; *Federal Mining & Smelting Co. v. Bunker Hill & Sullivan Mining & Conc. Co.*, (C. C.) 187 F. 474; *Ames Realty Co. v. Big Indian Mining Co.*, (C. C.) 146 F. 166; *Miller v. Lux*, 218 U. S. 258; 31 S. Ct. 11; 54 L. Ed. 1032. *This results from the reasoning that the jurisdiction of the court attaches upon the filing of the original bill of complaint and federal jurisdiction appearing therein, incidental to that jurisdiction in order to do complete justice between all of the parties, the court may and should entertain all cross bills or counter claims relating to the subject matter relied upon by plaintiff and decide all questions necessary to a complete adjudication of all issues involved in the subject matter of the original bill. Campbell et al. v. Golden Cycle Min. Co.*, 8 Cir.; 141 F. 610; *Moore v. New York Cotton Exchange*, D. C. 291 F. 681, affirmed 2 Cir. 296 F. 61; *Id.* 270 U. S. 593; 46 S. Ct. 367; 70 L. Ed. 750; 45 A. L. R. 1370. *The decision last cited is applicable not only to the propriety of cross bills but also to that of counter claims growing out of the same subject matter covered by rule 13.*" (Italics ours.)

See *Moore v. U. S. Cotton Exch.*, 270 U. S. 573; 46 Sup. Ct. 367, wherein it is held that such a construction should be placed upon the federal rules.

VII.

THE CLAIMANT HAS BEEN ADJUDICATED AS ENTITLED TO THE FUND DEPOSITED IN COURT BY REASON OF THE BREACH OF THE CONTRACT BY THE CENTRAL AVENUE DAIRY INC. EVERT L. HAGAN SHOULD NOT NOW HAVE TO SEEK ANOTHER TRIBUNAL TO COLLECT HIS DAMAGES SUFFERED BY REASON OF THE SAME BREACH OF THE SAME CONTRACT.

56 Harvard Law Review 969;

Freeman v. Bee Mch. Co., 319 U. S. 448, 63
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Moore Federal Practice, page 586.

CONCLUSION AND ARGUMENT

The sole question here is the adequacy of a Federal District Court to handle to completion litigation presented to it. Can the Federal Courts, having obtained complete jurisdiction of the parties to an action, do complete justice between them or can it do a piecemeal portion thereof and send the litigants off to another tribunal to obtain justice? Appellant believes that this Court, knowing of already crowded dockets in every court in the land, should and will welcome an opportunity to finally dispose of all germane issues to any controversy that is presented to it, so long as the original jurisdiction is proper and correct.

Attention of the court is called to the holdings in the *Bee Machinery* case, 63 Supp. Ct. Rep. 1146, and in *U. S. ex rel. Foster Wheeler v. Am. Surety Co.*, 25 Fed. Supp. 700. The effect of these cases is to establish the rule that ONCE A FEDERAL COURT OBTAINS JURISDICTION OF PARTIES SAID JURISDICTION IS GENERAL AND NOT SPECIAL, and any matters germane to the issues of the original jurisdiction may be decided by the Court. This is true even though these other germane matters might not have been matters which taken alone and within themselves would be matters for the basis of original federal jurisdiction. See *Moore v. New York Cotton Exchange*, 270 U. S. 573; 46 Sup. Ct. 367.

The question before the Court is in reality the ability of the Federal Courts to make themselves adequate to the demands of modern litigation. Who would be prejudiced by a ruling that the cross complaint could be properly entertained? The Central Avenue Dairy, already in court upon the interpleader could make any legal defense it might have. Evert L. Hagan will have the right given him to have all issues arising out of the controversy determined in one suit. Is complete justice apt to be accomplished by two courts hearing the matter piecemeal? Or by one court taking cognizance of the entire relation between the parties, and finally once and for all adjudging the rights of the parties.

Justice will be more nearly performed by a complete determination rather than a determination in

parcels. The District Court should have entertained the cross complaint, and appellant respectfully submits that in not so doing, it has fallen into error.

Respectfully submitted,

EVERT L. HAGAN, **IN** PRO
Attorney for Appellant.

No. 12211.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVERT L. HAGAN, doing business as EL REY CHEESE
Co.,

Appellant,

vs.

CENTRAL AVENUE DAIRY, INC.,

Appellee.

APPELLEE'S BRIEF.

Appeal from the United States District Court for the
Southern District of California
Central Division

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Appellee.

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No. 12211.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVERT L. HAGAN, doing business as EL REY CHEESE
Co.,

Appellant,

vs.

CENTRAL AVENUE DAIRY, INC.,

Appellee.

APPELLEE'S BRIEF.

I.

Statement of Facts and Issues Presented by the Pleadings and Which Are Determinative of This Case.

On October 7, 1948, plaintiff, Title Insurance and Trust Company, filed its complaint in interpleader in the above entitled action in the District Court of the United States, Southern District of California, Central Division, under the provisions of the United States Code, Title 28, Section 1335, alleging that the defendants Evert L. Hagan and Central Avenue Dairy, Inc., did each demand of plaintiff that plaintiff pay to such respective defendants the sum of \$1750.00 deposited by Evert L. Hagan on September 6, 1946 with plaintiff, in connection with its Escrow No. 249622 to be disbursed pursuant to instructions by both

of said defendants and praying for an order requiring said defendants to interplead concerning said claims. [Tr. pp. 2-6.]

The plaintiff deposited said sum of \$1750.00 with the Registrar of the Court on the said 7th day of October, 1948. [Tr. pp. 6-7.]

Pursuant to the motion of plaintiff, summons was issued directed to said defendants and a restraining order was issued on October 7, 1948, restraining defendant from prosecuting any action in respect to said deposit until further order of the Court and ordering defendants to show cause why said injunction should not be made permanent. [Tr. pp. 9-11.]

On November 1, 1948, defendant Evert L. Hagan filed his answer, claim and cross-complaint in said proceedings in interpleader. By said answer it is alleged that defendant Central Avenue Dairy, Inc., a corporation, is a corporation organized under the laws of the State of Arizona, having its principal place of business in the City of Phoenix, State of Arizona. It is expressly admitted by said answer that said sum of \$1750.00 was on deposit with plaintiff and that both of said defendants claimed said sum. By the prayer of said answer defendant Hagan asked that an interpleader be adjudged to be proper. [Tr. pp. 11-13.]

By the claim of Evert L. Hagan contained in the answer, claim and cross-complaint filed on the 1st day of November, 1948, he alleged that he was the manufacturer of two brands of cheese known respectively as "La Barca" and "El Rey Cheese" and that on November 8, 1938, Evert L. Hagan and Central Avenue Dairy, Inc., entered into a written contract whereby Hagan

granted defendant Central Avenue Dairy, Inc., the exclusive right to sell said two brands of cheese in the States of Arizona, New Mexico and Texas and whereby Central Avenue Dairy, Inc., agreed to sell and furnish the said two brands of cheese to Evert L. Hagan exclusively in the State of California at the prices set forth in said contract, and said claim further alleged that the contract recited that Hagan was indebted to Central Avenue Dairy, Inc. in the sum of \$3795.04 which should be paid at the rate of one cent per pound over and above the prices scheduled in said contract and that said Hagan would order and purchase at least 9000 pounds of such two brands of cheese per month until said sum of \$3795.04 should be paid in full.

The claim then proceeds to allege that on September 6, 1946, said sum of \$1750.00 was deposited by Hagan with Title Insurance and Trust Company to secure to Central Avenue Dairy, Inc., full performance of said contract by Evert L. Hagan, said sum being so deposited in lieu of a certain promissory note in the sum of \$3795.04 secured by a deed of trust and chattel mortgage theretofore given, which were provided for by the terms of said contract.

The claim then proceeds to allege that Central Avenue Dairy, Inc. had breached said contract in several respects, including the refusal to ship any more of said cheese at the prices specified in said contract and refused to make further shipments of El Rey Cheese and that Central Avenue Dairy, Inc., sold and delivered La Barba and El Rey Cheese to certain dealers in the City of Los Angeles, County of Los Angeles, State of California, contrary to the terms of said agreement of November 8, 1938, and that in the month of August, 1945, Central Avenue Dairy, Inc., refused to ship any more of either

brand of cheese even though it is alleged that at that time 110,000 pounds of cheese still remained to be shipped under the terms of the said contract and that such conduct on the part of Central Avenue Dairy, Inc., rendered it impossible for Evert L. Hagan to perform his contract by paying the balance of said sum of \$3795.04 at the rate of one cent per pound for each pound of cheese ordered by Evert L. Hagan and delivered by Central Avenue Dairy, Inc., to said Evert L. Hagan under the terms of said contract, and that such facts constituted a waiver of any right on the part of Central Avenue Dairy, Inc., to the balance of said sum of \$3795.04 and to the sum of \$1750.00 deposited in said escrow as security for the performance of said contract. Said claim concluded with a prayer that the Court adjudge that Evert L. Hagan alone was entitled to receive said sum of \$1750.00. [Tr. pp. 13-22.] It is to be noted that Central Avenue Dairy, Inc., would be entitled to said deposit if Hagan breached his contract, but the breach of contract by Central Avenue Dairy, Inc., would not effect the rights of either to the deposit.

By Paragraph I of the cross-complaint filed with said answer and claim defendant Hagan incorporated Paragraphs I to IX, inclusive, of his claim as a part of his cross-complaint, which paragraphs are summarized above and by Paragraph II of said cross-complaint it is alleged that by reason of the asserted breaches of the written contract of November 8, 1938, defendant was damaged in the sum of \$200,000.00 and prays a personal judgment

against Central Avenue Dairy, Inc., for such sum. [Tr. p. 22.]

It is to be noted, therefore, that by his answer defendant Hagan admits Title Insurance and Trust Company is entitled to an order of interpleader and by his claim he seeks a judgment *in rem* alleging that he is entitled to the \$1750.00 deposited by him with Title Insurance and Trust Company as security for his performance of the contract of November 8, 1938, it being asserted that by reason of the alleged breach of said contract by Central Avenue Dairy, Inc., it waived all right to the unpaid portion of the balance of \$3795.04 and to the amount deposited to secure the performance of said contract by Evert L. Hagan, while by the cross-complaint he seeks a personal judgment for damages in the sum of \$200,000.00 alleged to have been caused by the breach of such contract by Central Avenue Dairy, Inc.

The return on service of writ filed herein discloses that the services of said answer, claim and cross-complaint on the therein named Kramer, Morrison, Roche and Perry was attempted to be made by B. J. McKinney, United States Marshal for the District of Arizona, acting through his Deputy, M. Cassie Baker, by the said M. Cassie Baker delivering to R. Wm. Kramer, member of firm and statutory agent for Central Avenue Dairy, Inc. by handing to and leaving a true and correct copy thereof with Mr. Kramer at 11:45 A. M., on the 9th day of November, personally at Phoenix in said District of Arizona, on the 9th day of November, 1948. Said re-

turn on service is set forth in the transcript at page 30 as follows:

“RETURN ON SERVICE OF WRIT

United States of America,
District of Arizona—ss:

Civil 8741-BH, So. Dist., Calif.

I hereby certify and return that I served the annexed Answer, Claim, Cross-Complaint of Defendant Complainant Hagan on the therein-named Kramer, Morrison, Roche and Perry by delivering to R. Wm. Kramer, member of firm and statutory agent for Central Avenue Dairy, by handing to and leaving a true and correct copy thereof with Mr. Kramer at 11:45 a. m. on the 9th day of November, personally at Phoenix in said District on the 9th day of November, 1948.

Service, \$2.00; Travel, .06.

B. J. McKINNEY,

U. S. Marshal,

By /s/ M. CASSIE BAKER,

Deputy.”

It is to be noted that the return does not purport to allege that a summons on said cross-complaint or any summons whatever was attached to said answer, claim and cross-complaint when it was delivered to R. Wm. Kramer, nor is the firm of Kramer, Morrison, Roche and Perry named as parties to said action.

The transcript also contains a “Return on Service of Writ” from which it appears that the copy of summons with attached copy of complaint in interpleader and order of injunction and for process was served on Edwin G. Geare, President of Central Avenue Dairy, Inc., per-

sonally, at Phoenix, Arizona, on October 19, 1948. This return is set forth at pages 31-32 of the transcript as follows:

“RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 14th day of October, 1948, I received the within summons and on October 19, 1948, served the Central Avenue Dairy, Inc., by delivering to Edwin G. Geare, President of Company, copy of Summons with attached copy of Complaint in Interpleader and Order of Injunction and for Process and showing him the original Summons at 10:15 a. m. at the Central Avenue Dairy, 3104 North Central Ave., Phoenix, Arizona.

Marshal's Fees: Travel, \$.24; Service, \$2.00; Total \$2.24.

B. J. McKINNEY,
United States Marshal,
By /s/ M. CASSIE BAKER,
Deputy United States Marshal.

(Endorsed): Filed Nov. 3, 1948. (32.)”

On November 15, 1948, pursuant to the order to show cause issued October 7, 1948, the District Court made and entered its order restraining defendants from prosecuting any action in respect to said deposit. [Tr. pp. 33-34.]

The defendant Central Avenue Dairy, Inc., made no appearance nor response in respect to such order to show cause.

On November 22, 1948, defendant Central Avenue Dairy, Inc., appeared specially and filed its notice of motion to quash and set aside attempted service of process and to quash and set aside attempted service of answer, claim and cross-complaint of defendant Evert L. Hagan.

The grounds of said motion may be briefly summarized as follows:

1. That the delivery of a copy of the answer, claim and cross-complaint to R. Wm. Kramer on November 9, 1948, at the City of Phoenix, Maricopa County, State of Arizona, without any summons being attached to said cross-complaint was not sufficient to vest the District Court with jurisdiction over the person of the defendant Central Avenue Dairy, Inc., in respect to said cross-complaint;

2. That the delivery of a copy of said answer, claim and cross-complaint to R. Wm. Kramer personally as agent appointed pursuant to the laws of the State of Arizona to receive service of process for Central Avenue Dairy, Inc., without a summons upon said cross-complaint being attached thereto in the City of Phoenix, Maricopa County, State of Arizona, the said Central Avenue Dairy, Inc., not having made a general or special appearance in said action prior to the delivery of a copy of such answer, claim and cross-complaint to said R. Wm. Kramer was not sufficient to vest said District Court with jurisdiction over the person of the defendant Central Avenue Dairy, Inc., in respect to said cross-complaint;

3. That the mailing on October 30, 1948, of a copy of the said answer, claim and cross-complaint to Kramer, Morrison, Roche and Perry at the City of Phoenix, State of Arizona, as alleged attorneys for defendant Central Avenue Dairy, Inc., said defendant not having theretofore made a general or special appearance in said action, and a copy of the summons on the cross-complaint not having been attached to or mailed with said answer, claim and cross-

complaint, was not sufficient to vest the said District Court with jurisdiction over the person of the defendant Central Avenue Dairy, Inc. [Tr. pp. 35-37.]

It appears from the affidavit of Ed. A. Geare, President of Central Avenue Dairy, Inc., that Central Avenue Dairy, Inc., was incorporated under the laws of the State of Arizona on the 24th day of May, 1926, and never did any intrastate business in the State of California and never had an agent in the State of California, and has never maintained an office in California, and that any business which it may have had in California was wholly interstate in its nature. [Tr. pp. 38-39.]

It further appears from the affidavit of R. Wm. Kramer that when the United States Marshal for the District Court of Arizona, acting through one of its Deputies, delivered a copy of the answer, claim and cross-complaint in the above entitled action to him on November 9, 1948, Central Avenue Dairy, Inc., had not theretofore appeared in said action and that no summons on said cross-complaint was attached to said cross-complaint and that Central Avenue Dairy, Inc., did not then have any agent in California, nor was it doing any business in California. That there was no summons attached to the cross-complaint which was mailed to the law firm of Kramer, Morrison, Roche and Perry on October 30, 1948. [Tr. pp. 39-41.]

The motion of Central Avenue Dairy, Inc., to quash the service of said answer, claim and cross-complaint was granted December 20, 1948, and a judgment of dismissal as to said cross-complaint was filed December 31, 1948, and entered December 31, 1948, in Civil Order Book 55, page 44, in said District Court [Tr. pp. 44-47], from

which said judgment of dismissal said Evert L. Hagan appealed by filing his notice of appeal on January 3, 1949. [Tr. pp. 47-48.] Thereafter and on February 15, 1949, a default judgment was filed in said District Court adjudging that said Evert L. Hagan was entitled to the said sum of \$1750.00 which was deposited with the Registrar of the Court pursuant to the order of November 15, 1948. [Tr. pp. 44-47.]

An examination of appellant's contentions and statement of points on appeal discloses that it is his contention that the delivery of the copy of the answer, claim and cross-complaint to R. Wm. Kramer at Phoenix, in the County of Maricopa, State of Arizona, as member of firm of attorneys who had not theretofore appeared for Central Avenue Dairy, Inc., in said action, and as statutory agent to receive service of process on behalf of Central Avenue Dairy, Inc., was sufficient to vest the District Court of the United States, Southern District of California, Central Division, with such jurisdiction over the person of the defendant Central Avenue Dairy, Inc., as to authorize such District Court to render a personal judgment in favor of Evert L. Hagan and against Central Avenue Dairy, Inc., on the cross-complaint for damages alleged to have been caused by the same breach of the same contract as gave rise to the conflicting claims to the \$1750.00 deposited by Evert L. Hagan with Title Insurance & Trust Company.

It is clear from such statement of contention that appellant relies upon the provisions of Section 2361 of Re-

vised Title 28, U. S. Code, effective September 1, 1948 (formerly Section 41, subd. 26, Title 28, U. S. C. A. as amended by the adoption of Chapter 13 by the Second Session of the 74th Congress, 49 Statutes at Large, page 1096, on January 20, 1936), to justify the attempted personal service of the cross-complaint for damages upon the agent of Central Avenue Dairy, Inc., in the State of Arizona, by which cross-complaint it was sought to recover a personal judgment for \$20,000.00 against Central Avenue Dairy, Inc., for allegedly the same breach of the same contract which gave rise to the alleged conflicting claims to the subject of the complaint in interpleader, namely, \$1750.00 deposited with Title Insurance & Trust Company.

Section 2361 of Revised Title 28 of the U. S. Code provides as follows:

“In any interpleader action, a district court may issue its process for all claimants and enter its order restraining them from instituting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.”

However, the provision for such service of process outside of the state in which the Federal Court is held is confined to process whereby it is sought to obtain jurisdiction

over non-residents of the district in which the court is held with respect to their claim against the subject of the interpleader action, but does not provide a means of obtaining jurisdiction over a defendant by service in another state against whom a personal judgment is sought by a cross-complaint filed by a codefendant, regardless of whether such cross-complaint arises out of the same breach of the same contract which gave rise to the conflicting claims to the subject of the action in interpleader. Apart from the provisions of Section 2361 of Revised Title 28 of the U. S. Code, which is confined strictly to interpleader proceedings, there is no authority making effective the service of a cross-complaint for damages, filed by a citizen of one state against a citizen of another state, outside of the state in which the court is held.

In no event was the service of the cross-complaint effectual in this case for at the time of the delivery of the cross-complaint to Mr. Kramer as agent appointed by defendant Central Avenue Dairy, Inc., to receive process for it, no summons was attached to such cross-complaint, such defendant not having appeared in the action at the time that said cross-complaint was so delivered to Mr. Kramer.

Furthermore, service of process issued out of a Federal Court held in a state other than that of the residence of an agent appointed to receive service of process is ineffectual for any purpose. Neither was the mailing of the copy of the cross-complaint without a summons attached thereto to Kramer, Morrison, Roche and Perry at Phoenix, Arizona, effectual for any purpose whatsoever.

ARGUMENT.

I.

Section 2361 of Revised Title 28, U. S. C. A., Does Not Authorize or Warrant the Service Outside of the State in Which the District Court Is Held of a Cross-Complaint Filed by a Defendant in an Interpleader Action Against a Codefendant Whereby a Personal Judgment for Damages Is Sought by Such Cross-Complaint.

It appears from the return on service of writ [Tr. p. 30] that said cross-complaint, without a summons being attached thereto, was served on Kramer, Morrison, Roche and Perry by delivering to R. Wm. Kramer, member of firm and statutory agent for Central Avenue Dairy, Inc., by handing to and leaving a true copy thereof with R. Wm. Kramer at Phoenix, Arizona, on November 9, 1948. There is no allegation that any service was made on anyone who was the agent of Central Avenue Dairy, Inc., it not being stated that Kramer, Morrison, Roche and Perry were attorneys or the statutory agent for Central Avenue Dairy, Inc., and it further appearing that neither Kramer, Morrison, Roche and Perry, nor R. Wm. Kramer, were named as parties to said cross-complaint.

Even though the return of the Marshal had shown the service of the answer, claim and cross-complaint on R. Wm. Kramer as the statutory agent of Central Avenue Dairy, Inc., at the City of Phoenix, Maricopa County, in the State of Arizona, such service would have been ineffectual to acquire jurisdiction over the person of the defendant Central Avenue Dairy, Inc., in respect to the

alleged cause of action for a personal judgment against Central Avenue Dairy, Inc., for damages, for Rule 4F of Federal Rule of Procedure only authorizes service of process in the state in which the court is held, unless some statute of the United States expressly provides for service outside of the state in some particular case.

Section 2072 of Revised Title 28, U. S. Code, provides: "Nothing in the title, anything to the contrary notwithstanding, shall in anywise limit or repeal any such rules heretofore prescribed by the Supreme Court." This, of course, leaves Rule 4F in full force and effect.

Our contention in this behalf is determined beyond dispute in *Stitzel-Weller Distillery, Inc., v. Norman and Stitzel-Weller Distillery, Inc., v. Hartman*, 39 F. 2d 182. In that case the plaintiff brought two actions which were consolidated for trial seeking to have the conflicting claims to certain warehouse certificates issued by plaintiff determined. In Case No. 54 receipts for 56 barrels of whiskey were issued by plaintiff to Penfield Company, which receipts were transferred by Penfield Company to Norman and by Norman sold to E. Mugge Company, a Florida corporation, on June 22, 1938. The latter transaction was handled by a broker named Fisher who gave Norman trade acceptances drawn by E. Mugge Company on the Wauchula State Bank. On June 23, 1938, E. Mugge Company sold to Collins-Newman Company, a Kentucky corporation, receipts for 75 barrels of whiskey, including the 59 barrels originally owned by Norman. Collins-Newman Company immediately sold such receipts to R. L. Buse Company, an Ohio corporation. R. L. Buse Company thereafter sold receipts for 25 barrels of such whiskey to A. M. O'Connell.

In Case No. 58 receipts for 350 barrels of whiskey were issued by plaintiff to the Penfield Company and sold by Penfield Company to F. H. Hartman in 1936. On May 23, 1938, Hartman sold receipts for 200 barrels of such whiskey to E. Mugge Company. This last mentioned transaction was handled by Fisher, the same broker who had represented E. Mugge Company in the sale made by Norman to Mugge Company, above mentioned. Fisher also delivered to Hartman trade acceptances drawn by E. Mugge Company on the Wauchula State Bank. On May 23, 1938, Fisher sold receipts for the same 200 barrels of whiskey to Collins and Newman Co., representing that such whiskey belonged to him personally. At the same time Fisher sold to Collins and Newman Company receipts for 150 barrels of whiskey which he represented belonged to E. Mugge Company. Fisher cashed the check given for the receipts for the 200 barrels which he represented belonged to himself and E. Mugge Co., cashed the check given for the receipts for the 150 barrels which were represented to belong to E. Mugge Company.

On May 25, 1938, E. Mugge Company sold receipts for 200 barrels of whiskey to defendant R. L. Buse Company and receipts covering 150 barrels to Kentucky Distillers Receipts Corp., which latter corporation sold receipts for 100 barrels of whiskey to Griggs-Cooper & Company, a Minnesota corporation. The trade acceptances given by E. Mugge Company were not paid at maturity. Both Norman and Hartman repudiated their respective sales to E. Mugge Company claiming such sales were induced by the fraudulent representations of Fisher, the defendant bank and its President Crews and filed their cross-claims against Crews, Wauchula Bank, Cooper as Trustee for E. Mugge Company, Collins and Newman Company, R. L. Buse Company, Kentucky Distillers Receipts Cor-

poration and Griggs-Cooper & Company alleging fraudulent conspiracy to defraud them of their receipts and praying for a personal judgment for the value of the receipts if it was legally impossible to return the receipts to them. The evidence showed that the bank and its president controlled the affairs of E. Mugge Company and that Fisher was an agent for the bank and E. Mugge Company in negotiating the sale of the receipts and as such agent represented that E. Mugge Company was financially responsible when in fact it was practically insolvent. The Court held that the title of R. L. Buse Company, Kentucky Distillers Receipts Corporation, O'Connell and Briggs-Cooper & Company was good as against Norman and Hartman and that Collins and Newman were not liable in tort to either Norman or Hartman, it appearing that Collins and Newman purchased the receipts in good faith.

The cross-defendant R. L. Buse Company was served in Ohio and the cross-defendant Cooper, as trustee in bankruptcy for E. Mugge Company, Wauchula State Bank and Crews were served in Florida, that is, outside of the State of Kentucky, in which the Court in which the action was pending, was sitting.

R. L. Buse Company appeared and filed objections as to the jurisdiction over it in respect to the cross-complaint and the other three cross-defendants failed to answer and did not appear.

The Court in holding that no jurisdiction was acquired in respect to the cross-complaint as to those cross-defendants served outside of the State of Kentucky because the provisions of Section 41, Subdivision 26, 28 U. S. C. A., as amended January 20, 1936, and set forth in Chapter 13 of the Second Session of the 74th Congress, 49 Statutes at Large, page 1092, and now contained in Section 2361

of Revised Title 28, U. S. Code, only provided a means of acquiring jurisdiction over such defendants in respect to their claim to the warehouse receipts but not in respect to the cause of action set forth in the cross-complaint by which a personal judgment was sought against such non-residents of Kentucky, said at pages 187-8:

“Except where specifically authorized by a Federal statute, the civil process of a Federal District Court does not run outside the district and service outside the district is void. *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Munter v. Weil Corset Company*, 26 U. S. 276, 43 S. Ct. 347, 67 L. Ed. 652; *Robertson v. Railroad Labor Board*, 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119; *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 57 S. Ct. 273, 81 L. Ed. 289. Norman and the Hartman Company claim that jurisdiction is acquired by virtue of the provisions of Section 41(26), 28 U. S. C. A., which authorized the present interpleader proceeding. That statute does provide that the court in which the interpleader suit is filed shall have power to issue its process against all claimants and to issue an order of injunction against each of them, enjoining them from prosecuting any proceeding in any other court with respect to the money or property involved, which process and order of injunction shall be addressed to and served by the United States marshal ‘for the respective districts wherein said claimants reside or may be found.’ This statute confers jurisdiction over all the defendants served, even those residing in Ohio and Florida, with respect to their claims against the warehouse receipts. It does not confer jurisdiction over defendants in another state against whom a personal judgment is sought by a cross-bill filed by a codefendant. Such a proceeding is not an interpleader proceeding, and in such a proceeding the cross-defendants are

not 'claimants' as provided by the statute, but they are defendants in an action *in personam*. Although it might be desirable to dispose of all related claims in the one action and cross-defendants could accomplish this result by entering their appearance, yet the right to raise the jurisdictional question plainly exists if they prefer to have such question of personal liability disposed of in a separate proceeding. Although the court has jurisdiction in the interpleader proceeding and the venue in that phase of the controversy is proper under Section 41 (26), 28 U. S. C. A., yet the venue of the cause of action asserted by the cross-bill would not be proper if the cross-bill is treated as an independent proceeding. Section 51 of the Judicial Code; 28 U. S. C. A. 112; *Richard v. Franklin County Distilling Co.*, D. C. W. D. Ky., 38 F. Supp. 513, decided April 16, 1941, and cases therein cited. Although the question of venue may be waived by such cross-defendants as have failed to answer or to object (*Commercial Casualty Ins. Co. v. Consolidated Stone Co.*, 278 U. S. 177, 49 S. Ct. 98, 73 L. Ed. 252), yet it is also necessary that the court acquire jurisdiction over the person of the defendant before the claim for personal judgment can be adjudicated. See *Employers Reinsurance Corp. v. Bryant*, *supra*. The cross-defendants in Ohio and Florida are accordingly not before the court. Such defendants as are before the court under the cross-bills were not, in my opinion, the perpetrators of the fraud complained of, nor connected with it in such a way as to impose any personal liability upon them under the respective cross-claims of Norman and the Hartman Company. Accordingly, the cross-claims are dismissed."

It is clear that the jurisdiction conferred upon the Court by virtue of the service of process outside of the state in

which the Federal Court is situated pursuant to the provisions of Section 2361 of the Revised Title 28 of the U. S. Code is limited to the rendition of a judgment *in rem* whereby the conflicting claims to the subject of the complaint in interpleader may be determined but does not extend to the rendition of a personal judgment against such nonresidents on a cross-complaint served and filed by a defendant in an action in interpleader against a co-defendant, served outside of the state in which the court is held, even though the cause of action set forth in such cross-complaint is based on the same breach of the same contract as that which gave rise to the conflicting claims to the subject of the action in interpleader. This is so, for as the Court pointedly declared at page 188:

“Such a proceeding is not an interpleader proceeding, and in such a proceeding the cross-defendants are not ‘claimants’ as provided by the statute, but they are defendants in an action *in personam*.”

In other words, in accordance with the well established rule, substituted service by means of personal service in a state other than that in which the court is held is only sufficient to authorize the rendition of a judgment *in rem* and does not authorize the rendition of a judgment *in personam*.

Moreover, if it be contended that the decision in *Stitzel-Weller Distillery v. Norman*, *supra*, is not conclusive in the instant case because the acts which gave rise to the conflicting claims to the warehouse receipts were not the same acts as those which gave rise to the cross-complaint of Norman and Hartman for damages for fraud, we reply that such contention is not tenable for the Court in holding that the fraudulent acts of Fisher, Crews, the bank

and E. Mugge Company were such as to render the title of Norman and Hartman to the receipts subject to the claims of R. L. Buse Company, Kentucky Distillers Receipts Corporation, O'Connell and Griggs-Cooper & Company, said at 186:

"It appears well settled that the warehouse receipts in question have such a quality of negotiability as will protect a holder who has acquired them by purchase in good faith without knowledge of any defects in the title of his vendor. Kentucky Statutes, Section 4770; *Theis v. Canmann & Co.*, 59 S. W. 1093, 22 Ky. Law Rep. 1097; *Flexner v. Meyer's Executor*, 191 Ky. 133, 229 S. W. 99. With respect to the purchasers from Collins and Newman Company in both cases, namely, R. L. Buse Company, Kentucky Distillers Receipts Corporation, Arthur M. O'Connell and Griggs-Cooper and Company, the evidence completely failed to connect them in any way with the alleged fraudulent transactions or to attribute to them any knowledge or notice of the alleged defective title acquired by E. Mugge Company and subsequently purchased by Collins and Newman Company. The court finds that each of said purchasers was a purchaser for value without notice and that the title acquired in each instance is good as against the claims of J. W. Norman and F. H. Hartman, Inc. Accordingly Norman and Hartman Company have no valid claims to the receipt transferred by them to Fisher and now held by these claimants, irrespective of the conditions under which Collins and Newman Company acquired them from Fisher."

Notwithstanding such facts the Court held that it had not acquired such jurisdiction over the person of the defendants served with the cross-complaint outside of the State of Kentucky as to enable it to determine the cause

of action alleged therein for personal judgment for damages for fraud based on the same fraudulent acts of Fisher, Crews, the bank and E. Mugge Company, which subjected the titles of Norman and Hartman to the claims of R. L. Buse Company, Kentucky Distillers Receipts Corporation, Arthur M. O'Connell and Briggs-Cooper & Company.

However, it is immaterial whether the cause of action set up in the cross-complaint arose out of the same facts as those which gave rise to the conflicting claims to the subject of the interpleader action for Section 2361, Revised Title 28, U. S. Code, does not warrant the rendition of a personal judgment upon a cross-complaint served upon the defendants outside of the state in which the court is held.

The case of *Stitzel-Weller Distillery v. Norman, supra*, is the only case that an exhaustive research has disclosed which presents the question here involved. While the decision is that of a District Court the reasoning is so convincing that the cross-complainants were apparently of the opinion that an attempt to reverse it by appeal would be of no avail.

Neither does the fact that such service was attempted to be made on an agent appointed to receive service of process alter the rule. In *Junk v. Reynolds Tobacco Co.*, 24 Fed. Supp. 716, the Court said at page 719:

“Likewise in *Bonghim v. Hope Production Company*, 58 Fed. (2d) 1046, it was held that process issued in one district and served upon a designated agent in another district of the same state was ineffectual.”

By the adoption of Rule 4F of the Federal Rules of Procedure the territorial limits of the Court were made co-extensive with those of the state. However, service on an agent, or on a defendant, outside of the state is ineffectual.

The three cases cited by the appellant in this connection are all state court decisions and necessarily do not in anywise consider the effect of the provisions of Section 2361 of Revised Title 28, U. S. Code. A brief examination of these cases discloses that they are in nowise in point.

In *Irvin v. Ratliff*, 94 Ind. 583, plaintiff brought an action for the balance due on a construction contract against Ratliff and Bundy. Ratliff answered admitting he held certain money under a contract to pay therefrom the amount due from plaintiff to Bundy and that Bundy claimed the whole thereof and prayed that the controversy between plaintiff and Bundy be determined. On appeal it was held that the trial court properly rendered a judgment for Bundy against plaintiff for an amount in excess of the amount of money held by Ratliff.

In *Provident Savings & Loan Assn. v. Booth*, 293 N. W. 293, plaintiff filed a complaint in interpleader in respect to a credit of \$274.00 on account of shares of plaintiff, naming Booth and Securities Investment Corporation as defendants. Booth filed a cross-complaint against Securities Investment Corporation for \$800.00 alleged to be due from the latter to the former, such sum being the amount paid by Booth to Securities Investment Corporation for a tractor which was returned. Walker, as trustee for Booth, had a judgment against Securities Investment Corporation for \$1100 with an order to apply thereto the sum paid into court. The judgment was affirmed.

The other case cited is that of *Seattle v. Turner*, 29 Wash. 515. In that case plaintiff filed an action in interpleader to determine conflicting claims to a warrant issued by the city for \$478.00. The defendant Hall filed a cross-complaint seeking judgment for \$517.00 for street work performed by cross-complainant and asking that she be declared to have a lien on the warrant. The trial court refused such relief to Hall. On appeal it was held that Hall was entitled to the relief prayed for.

However, none of such decisions are of any avail to appellant herein for in each of such cases the action was pending in a state court and all defendants were residents of and served within the state within which the Court was sitting and all appeared. It is obvious that Section 2361 of Revised Title 28, U. S. Code, had no application whatever in any of these cases and it is only by virtue of such section that even a complaint in interpleader in a Federal Court action may be served outside of the state in which the Federal Court is held, but such section does not vest the Federal Court with jurisdiction over the person of a nonresident defendant in respect to a cause of action stated in a cross-complaint whereby a personal judgment is sought against such nonresident defendant.

Furthermore, it is to be noted that it is alleged in Hagan's claim contained in his answer, claim and cross-complaint that the \$1750.00 was deposited by Hagan with Title Insurance & Trust Company to secure to Central Avenue Dairy, Inc., full performance of the contract of November 8, 1938, by Hagan. [Tr. p. 18.] Hence the only question to be decided in order to determine who was entitled to said \$1750 was whether or not the contract had been performed by Hagan. The question of whether defendant Central Avenue Dairy, Inc., had or had not per-

formed its contract was immaterial. It surely follows that the determination of the cause of action alleged in the cross-complaint predicated on the alleged breach of the contract by Central Avenue Dairy, Inc., has absolutely nothing to do with the question of who is entitled to the \$1750 deposit. Our contention in this behalf is amply sustained by the holding in *Metropolitan etc. Co. v. Margolis*, 38 Cal. App. 711. In that case plaintiff, as surety upon a bond given to guarantee the performance of a contract for street improvements, brought an action against its principals, Margolis and Stullman, to recover money which plaintiff had paid to satisfy a judgment obtained against the principals and the surety for damages for breach of a contract between the County of Los Angeles and the principals under the bond. The defendant principals, together with a corporation, filed a cross-complaint against third persons who had breached their contract with the principals, by which contract such third parties had agreed to install the same improvements as those covered by the contract between the principals and the county. The cross-complainant appealed from an order granting the motion to strike out the cross-complaint. The Court in holding that the cause of action set forth in the cross-complaint did not bear the necessary relation to the cause of action set forth in the original complaint, said at pages 714-715:

“In such a situation, can defendants join with a stranger to the action and file a cross-complaint, not against the plaintiffs in the initial action, but against third parties, to recover damages for breach of an agreement to which the plaintiff was not a party? We think not.

.

“The validity of the cross-complaint herein therefore depends upon whether it comes within the ‘contract’ or ‘property’ clauses of the section, and this must be determined from the facts surrounding the cause of action and not particularly from the form of the complaint. In the case before us the cause of action stated in the original complaint was for recovery of moneys paid by plaintiff surety company on behalf of defendants, while the cross-complaint attempted to add a stranger as a cross-complainant and to recover damages from third parties for a breach of an agreement between such third parties and cross-complainants relating to the installation of certain improvements. Instead of being ‘related’ to the same transaction or contract, each claim is foreign to the other.”

Title Insurance and Trust Company, the plaintiff in the original action in interpleader, was not a party to the cheese sales contract. Inasmuch as the contract upon which the cross-complaint is predicated is not related to the contract in reference to the deposit, it is clear that the cross-complaint was not proper in any event. Such being the case it cannot be said that the cause of action set up in the cross-complaint is germane to the claim for the deposit.

Of course, apart from the provisions of Section 2361 of Revised Title 28, U. S. Code, there is no provision for the service of federal process outside of the state in which the Federal Court by which the process is issued sits.

In *Blank v. Bitker*, 135 F. 2d 962, plaintiff brought an action on a contract of guaranty in the United States District Court for the Northern District of Illinois. The defendant, a resident of Wisconsin, was served with process in Wisconsin. The Court in holding that no

jurisdiction of the person of defendant Bitker had thereby been acquired, said at page 965:

“Several reasons lead us to believe that the District Court never gained jurisdiction over Bitker. Rule 4(f) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c, provides that, except where a federal statute states that process may run throughout the United States, process ‘may be served anywhere within the territorial limits of the state in which the district court is held.’ Bitker was served in Wisconsin, outside the boundaries of Illinois. Hence he was beyond the territorial limits of effective service.”

See also:

Moreno v. United States, 120 F. 2d 129;

Miss. Pub. Corp. v. Murphree, 90 L. Ed. 185.

Neither was the mailing of the cross-complaint to Kramer, Morrison, Roche and Perry at Phoenix, Arizona, effectual.

In *Hess v. Palowski*, 71 L. Ed. 1091, the Court said at page 1094:

“Notice sent outside the state to a nonresident is unavailing to give jurisdiction in an action against him personally for money recovery.”

Moreover, no order of court was ever made for the attempted substituted service herein, nor was there any mailing to the defendant.

The judgment of dismissal in respect to the cross-complaint was properly rendered herein.

II.

If a Cross-Defendant Has Not Appeared in an Action at the Time of the Attempted Service of the Cross-Complaint It Is Essential That a Summons on the Cross-Complaint Be Attached Thereto.

It appears from the affidavit of R. Wm. Kramer that no summons was attached to the cross-complaint which was delivered to him by the United States Marshal on November 9, 1948, and that there was no summons attached to the cross-complaint which was mailed to Kramer, Morrison, Roche and Perry on October 30, 1948. [Tr. pp. 39-41.] In this connection appellant quotes Rule 5, Subdivision (a) of Rules of Federal Procedure, which requires all papers to be served on the parties affected thereby, provided that service need not be made on parties in default except that pleadings asserting new or additional claims must be served upon them in the manner provided for service of summons in Rule 4.

The summons issued upon the complaint in interpleader required defendant Central Avenue Dairy, Inc., to serve its answer upon plaintiff's counsel within twenty days after the service of summons exclusive of the date of service. [Tr. p. 31.] The complaint in interpleader was served on Ed G. Geare, President of Central Avenue Dairy, Inc., on October 19, 1948, at 10:15 A. M. [Tr. pp. 31-32.] Accordingly defendant Central Avenue Dairy, Inc., was required to serve its answer by November 8, 1948, and was, therefore, in default in respect to the complaint in interpleader when the United States Marshal attempted to serve the cross-complaint on R. Wm. Kramer on November 9, 1948, at 11:45 A. M. The cross-complaint clearly asserted an additional claim against Central Avenue Dairy, Inc. It follows that the quoted section

clearly required the service of the summons on the cross-complaint for Rule 4, Subdivision (d), provides "the summons and complaint should be served together." Appellant also quotes Subdivision (f) of Rule 4, which provides that process may be served beyond the territorial limits of the state when the statute of the United States so provides.

Apart from Section 2361 of Revised Title 28, U. S. Code, which applies exclusively to interpleader actions, there is no statute which authorizes process to be served outside of the state in which the Federal Court is held in an action whereby a personal judgment is sought by an individual resident of one state against an individual resident of another state. Moreover, there is no provision in the Federal Rules of Procedure in respect to the method of serving a cross-complaint, even within the territorial limitations of the state in which the Court is held, where the cross-defendant has not theretofore appeared in the action, particularly in respect to the question of whether a summons must be issued upon and served with the cross-complaint. Under such circumstances the state statute governs.

In *Felgemaker v. Ocean Accident & Guarantee Corp.*, 47 Fed. Supp. 660, the Court said at page 663:

"United States courts are bound by the Rules of Civil Procedure (Rule 1) and are therefore not obliged to follow state procedure. They should, however, give effect to state rules of practice if not inconsistent with federal rules (Rule 15 (d), Rules of Civil Procedure) especially when such practice serves the ends of established federal law."

Section 442 of the Code of Civil Procedure of the State of California provides as follows:

“If any of the parties affected by the cross-complaint have not appeared in the action, a summons upon the cross-complaint must be issued and served upon them in the same manner as upon the commencement of an original action.”

In *Herriage v. Texas etc. Ry. Co.*, 11 F. 2d 671, the Court said at page 671:

“As to foreign or nonresident corporations, in the absence of a federal statute, the law of the state is followed for making service; but this does not carry the right to a Federal District Court to send its process beyond its territorial limits.”

Appellant cites *United States v. Murphy*, 82 Fed. 893, to the following effect:

“Process embraces all steps and proceedings in a cause from its commencement to its conclusion.”

The language of the Court is as follows:

“The legal meaning of the word ‘process’ varies according to the context, subject-matter, and spirit of the statute in which it occurs. The process of the court, in its narrowest sense, means the writs and mandates of the court under the seal thereof.

“In its largest sense, process is equivalent to procedure, including all the steps and proceedings in a cause from its commencement to its conclusion.”

It is obvious that it is in the narrower sense that the word “process” as used in Rule 4 of the Rules of Federal Procedure.

The portion of the pleading designated "answer, claim and cross-complaint" by which a personal judgment for damages is sought against Central Avenue Dairy, Inc., must be deemed to be a cross-complaint as it seeks relief against a coparty rather than an opposing party.

Subdivisions (a) and (b) of Rule 13 of Rules of Federal Procedure provide that a counterclaim may be filed against an opposing party and Subdivision (g) of such Rule provides that a cross-complaint may be filed against a coparty. However a counterclaim cannot be asserted against a coparty because a counter claim must state a cause of action in favor of the defendant and against the plaintiff. (See: *Gorton Bridge Mfg. Co. v. American Bridge Co.*, 151 Fed. 871.)

Appellant then quotes from *Cyclopedia of Federal Procedure* (2nd Ed.), Vol. 4, page 85, to the effect that no process on a counterclaim is necessary to bring in a plaintiff or defendant. This statement is obviously inapplicable to the present case for the pleading by which Hagan seeks a personal judgment against his codefendant Central Avenue Dairy, Inc., is properly designated and must be considered as a cross-complaint rather than a counterclaim because a counterclaim will not lie against a codefendant. One of the cases cited in support of the quoted text is that of *Grossman v. United States*, 280 Fed. 683. In that case it was simply held that the omission in not having a summons issued and served on a cross-complaint was cured by the filing of an answer thereto and by the participation in the trial by the cross-

defendant. The rule is undoubtedly correctly stated by the United States Supreme Court in *Smith v. Woolfolk*, 29 L. Ed. 357, at 359 as follows:

“It is settled that one defendant cannot have a decree against a codefendant without a cross bill, with proper prayer, and process or answer, as in an original suit.”

Appellant then quotes from Hughes' Federal Practice, 1940 Ed., page 226, to the effect that if the original summons and complaint has been served under Rule 4, the Court may exercise that jurisdiction in connection with anything related to the case and arising because of it. However no authority is cited in support of the text and obviously it has no application to interpleader actions in which it is sought to obtain a personal judgment on a cross-complaint without a summons being issued thereon. The rule applicable in the present case is that set forth at a point shortly preceding appellant's quotation from Hughes' Federal Procedure and is found at pages 226-7 as follows:

“It would seem logical that service of one summons should be sufficient to inform the party that suit has been brought against him and should be sufficient to give the court jurisdiction of all claims arising in the same action. On the other hand, it might be argued that a new claim asserted by a codefendant, a third party defendant, or an intervenor—in short, by anyone other than the original plaintiff—is virtually a new suit against the same defendant, although one which will be adjudicated in the same action as the

original claim, and consequently a new summons should issue.

“However, the wording of the section is that service shall be made ‘in the manner prescribed for service of *summons*’ (italics ours) and not ‘for service of process,’ which would clearly indicate that a new summons was necessary.”

It must be concluded that a summons on a cross-complaint would have been necessary in order to make a valid service of the cross-complaint even within the State of California if such service was attempted to be made before the defendant had appeared in the action. Such being the case the service of the cross-complaint outside of the State of California without a summons having been issued in respect thereto and received therewith would be wholly ineffectual for two distinct reasons, first, such cross-complaint could not be effectually served outside of the State of California even though summons on the cross-complaint had been issued and served therewith. (See: *Stitzel-Weller Distillery, Inc. v. Norman, supra*), and second, no summons was issued or served with such cross-complaint.

III.

Appellant's Contention That the Acquisition of Jurisdiction of the Parties in Respect to the Complaint in Interpleader Vested Jurisdiction in the Court to Determine the Issues Presented by the Cross-Complaint Is Untenable.

A brief examination of the cases cited by appellant in this behalf will show them to be wholly inapplicable.

In *Mathis v. Ligon*, 39 F. 2d 455, cited by appellant, plaintiff brought an action to cancel a tax deed to Mathis. By a cross-complaint Mathis sought to quiet title against plaintiff and other defendants. While the Court found that the tax deed to Mathis was void it held that it had jurisdiction to adjudicate the issues raised by the cross-complaint of Mathis. This is of no avail to appellant herein as no personal judgment was sought and no service of process outside of the State was involved.

In *Barnett v. Mayes*, 43 F. 2d 521, cited by appellant, an action in the nature of a creditor's bill was commenced to foreclose a mechanic's lien upon 40 acres of oil land alleged to have been owned by one Mayes. The defendant Barnett answered alleging ownership of 80 acres in addition to the 40 acres described in the complaint. The trial court found in favor of Mayes in respect to the entire 120 acres. The judgment was affirmed, the Court holding contrary to Barnett's contention that the Court had jurisdiction over the entire tract.

In *Jones v. St. Paul Fire & Marine Ins. Co.*, 108 F. 2d 123, cited by appellant, the insured had judgment on a policy of fire insurance which was reversed. Thereafter

the insured moved for a summary judgment for the amount of the premiums pursuant to amended pleadings filed without leave of Court. Upon appeal it was held that the Court would have had jurisdiction to determine the rights to the premiums if leave had been secured to file the necessary amended pleadings.

In *Sun Oil Co. v. Burford*, 130 F. 2d 11, cited by appellant, plaintiff sought to cancel an oil permit issued to Burford, it being alleged that the latter was procuring more than his share of the oil from the tract. Upon a rehearing the Court held that the Federal Court having acquired jurisdiction based on diversity of citizenship it has power to decide all issues under both State and Federal law and therefore had jurisdiction to enforce the State Conservation Act.

In *El Paso & S. W. R. Co. v. Arizona Corp. Com.*, 51 F. 2d 573, cited by appellant, plaintiff sought an order restraining defendant Commission from enforcing the reparation order of the defendant Commission on the grounds that the order was a violation of the Fourteenth Amendment to the Federal Constitution in that the penalty for violation thereof was so severe as to deprive plaintiff of its property without due process of law. The Court held that the assertion of the violation of the Federal Constitution gave the Federal Court jurisdiction to determine all questions in the case even though it did not pass upon the federal question at all and decided the case on local and state questions alone.

In *United States v. Pryor*, 2 Fed. Rules Service, 197, (U. S. Dist. Ct., No. Dist. of Ill.), cited by appellant, plaintiff, as assignee of the North American Finance Corp., brought an action against the maker of a promissory note. The Court held that a counter-claim for affirma-

tive relief by way of damages for fraud against the party from whom the maker of the note purchased a stoker was proper, the note having been executed for a loan which was guaranteed by the United States under the National Housing Act. It will be noted that the case did not involve the service of a counterclaim outside of the State of Illinois in which the Court was held.

In *Sherman Nat. Bank v. Shubert Theatrical Co.*, 238 Fed. 225, cited by appellant, a New York corporation brought an action in the Federal District Court of New York in the nature of a bill in interpleader to determine conflicting claims to a bank deposit. The Shubert Theatrical Company filed its answer and moved for the dismissal of the action. The plaintiff also claimed an interest in the deposit as assignee of the depositor. The trial court held that the action in interpleader was ancillary to an action at law theretofore commenced in the New York Court by Shubert Theatrical Company, a New Jersey corporation, one of the claimants in the instant action. The trial court held that it had jurisdiction to determine all of the claims regardless of the fact that the Shubert Theatrical Company was a New Jersey corporation. The opinion upon appeal by the Shubert Theatrical Company is found at 247 Fed. 265. It was there held that the deposit constituted the *res* and that as the nonresidence claimant was the plaintiff in the prior action at law the Court had jurisdiction to proceed against the nonresident who had filed its answer. However, in holding that the rights of the persons outside of the State of New York in respect to personal controversies would not be prejudiced by the final judgment, said at page 258:

“The answer of the Shubert Theatrical Company of New Jersey put the complainant on proof of its

case. The answer of the Welden National Bank admitted the allegations of the bill and prayed for similar relief. The record is defective in failing to show the citizenship of the defendants not answering, or whether the subpoena was or was not served upon them, or whether they were or were not beyond the jurisdiction of the court.

“In the case of a *res* within the jurisdiction of the court the interests of persons without the jurisdiction are determined and disposed of as provided in section 57 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1102, Comp. St. 1916, Par. 1039). In the case of personal controversies, the rights of parties without the jurisdiction will not be prejudiced by the final decree in the cause. Equity rule 39 (198 Fed. XXIX, 115 C. C. A. XXIX).”

It is to be noted that in the case of *Sherman National Bank v. Shubert Theatrical Company*, *supra*, there was no attempt by any of the claimants to recover a personal judgment against any of the parties to the action. This fact distinguishes the case from the one at bar.

In the case of *United States v. American Surety Co.*, 25 Fed. Supp. 700, cited by appellant, the *use* plaintiff, being a subcontractor, brought an action in the name of the United States against the surety on a *payment* bond furnished by the defendant general contractor. The appellant herein quotes from this case to the effect that the general contractor was required to assert all counterclaims he had against the *use* plaintiff, that is, the subcontractor. However, this case is of no avail to appellant herein as the Court expressly pointed out that all of the parties were New York corporations and as such were residents of the State of New York, excepting the United States, in which name the action was commenced.

It follows that no case relied on by appellant in the slightest degrees bears on the question here presented.

Moreover, the cause of action for damages must be deemed to be a cross-complaint, rather than a counterclaim, as a counterclaim will not lie against a co-defendant as none of them involve the effect of the service, outside of the state in which the court is held, of a cross-complaint for a personal judgment, to which no summons was attached, and in which no general appearance was made by such nonresident cross-defendant.

IV.

The Rule That Equity Frowns Upon Multiplicity of Actions Is Not Applicable to the Present Situation.

Appellant cites two cases in this connection, neither of which can be found in any published index of cases. However, the rule that equity frowns upon multiplicity of actions is wholly inapplicable if the Court in which an action is pending has no jurisdiction over the person of the cross-defendant in respect to another cause of action sought to be litigated therein.

The United States District Court of the Southern District of California, Central Division, had no such jurisdiction over the person of Central Avenue Dairy, Inc., in respect to the cause of action stated in the cross-complaint as to enable the Court to determine the cause of action stated in such cross-complaint. The doctrine forbidding unnecessary multiplicity of actions has no application unless the joinder of several matters in one suit will really simplify and consolidate the issues; there is no avoidance of multiplicity of suits by simply uniting them in one proceeding. (See: *Parsons Construction Co. v. Gifford*, 262 N. W. 508, and *Hale v. Allison*, 47 L. Ed. 380.)

This reasoning is particularly applicable in the present case for the judgment entered on the complaint in interpleader [Tr. pp. 44-47] has entirely disposed of the issues raised by the complaint in interpleader and there is now no action pending by the plaintiff therein in respect to which the cause of action alleged in the cross-complaint can be germane.

Moreover, if the action in interpleader was still pending the issues in respect thereto would be entirely foreign to those presented by the cross-complaint and no avoidance of multiplicity would be achieved by uniting them in one action.

In *United Cig. Machine Co. v. Winston Cig. Mach. Co.*, 194 Fed. 947, plaintiff brought an action in equity against one of its stockholders for damages for breach of a contract and to enforce a lien on the stock issued by plaintiff to defendant for the amount of the judgment. Equity jurisdiction was invoked on the grounds of avoiding multiplicity of actions. But the Circuit Court of Appeals in affirming the order dismissing the action and in holding there were no grounds of equitable jurisdiction based on the avoidance of multiplicity of suits, said at page 962:

“The bill presents no equity to avoid multiplicity of suits, no equity for discovery, accounting, or injunction. Therefore the doctrine that the equity court having jurisdiction for one purpose will do complete justice goes not so far as to embrace this case, as in it the sole right to equitable relief is dependent on and merely auxiliary to a disputed demand for unadjudicated damages.”

In other words, an action *in personam* for damages is not relevant or germane to a cause of action to foreclose a lien, which is an action *in rem*.

V.

Rule 13(g) of the Federal Rules of Procedure Does Not Authorize the Determination of the Cause of Action Alleged in the Cross-Complaint Herein in the Present Action.

In this connection appellant cites and quotes from *Carter Oil Co. v. Wood*, 30 Fed. Supp. 887, to the effect that the Court should entertain all cross-bills and counterclaims related to the subject matter relied upon by the plaintiff and determine all questions necessary to a complete adjudication of all issues involved in the subject matter of the original complaint. In that case plaintiff sought to restrain defendant from interfering with plaintiff's rights as lessee under a lease from the First State Bank. Defendant filed a counterclaim seeking the cancellation of the bank's title predicated on a deed given to secure a debt owing by defendant to the bank and which debt the defendant offered to pay. The Court held that the counterclaim was germane to the original complaint and that jurisdiction of a non-resident defendant by substituted service was sufficient because the action involved title to real property rather than the recovery of a personal judgment. But in pointing out that if the counterclaim did not relate to the subject matter of plaintiff's cause of action the counterclaim would not lie, said at page 877:

"It has been held that such a counterclaim, not being ancillary to the original complaint, cannot derive jurisdiction from the original bill but must present such an action as the federal court would have jurisdiction of as an independent suit."

In *Moore v. U. S. Cotton Exchange*, 270 U. S. 573, cited by appellant, plaintiff sought to have a contract between the defendant Cotton Exchange and the defendant

Telephone Company cancelled as constituting a monopoly and to compel the Cotton Exchange to furnish plaintiff with the quotations of the Cotton Exchange. The Cotton Exchange filed a counterclaim seeking to enjoin plaintiff from purloining its quotations. The Court held that the cause of action stated in the counterclaim arose out of the same transaction as the original complaint. However, no question of jurisdiction of the person of a non-resident defendant was involved.

Rule 13(g) of the Federal Rules does not authorize service of a cross-complaint outside of the state in which the court is held.

VI.

The Judgment in Favor of Hagan Entered Upon the Complaint in Interpleader Was Not Predicated on the Breach of the Contract by Central Avenue Dairy, Inc.

The appellant asserts that it has been adjudicated in the lower court that he was entitled to the money deposited with Title Insurance & Trust Company by reason of the breach of the contract by Central Avenue Dairy, Inc., and appellant should not be obliged to seek another tribunal to collect damages caused by the breach of the same contract. We have pointed out that the deposit was made by Hagan to secure to Central Avenue Dairy, Inc., the performance of the contract by Hagan. [Tr. p. 18.] Therefore, Hagan was entitled to the deposit if he performed his part of the contract and the determination that he was entitled to such deposit in nowise involved a determination of whether there had been any breach of the contract by Central Avenue Dairy, Inc. In fact it is to be noted that the default judgment in respect to the deposit does not

attempt to adjudicate any reason for awarding the deposit to Hagan, the judgment being confined to the declaration that Hagan is the only one who has laid claim to the said deposit and that no just cause appears for delaying the disbursement thereof to him. [Tr. p. 46.]

In *Freeman v. Bee Machine Co., Inc.*, 87 L. Ed. 1509, also cited by appellant, the Supreme Court held that the Circuit Court of Appeals properly reversed an order of the District Court denying a motion to amend the complaint alleging an additional cause of action after the case was transferred on defendants motion from the Massachusetts State Court to the Federal District Court in Massachusetts. The defendant was served personally in Massachusetts before the case was transferred to the Federal Court and appeared generally in the Federal Court and filed an answer and counterclaim. Such personal service in the state court and participation in the proceedings in the Federal Court clearly distinguishes *Freeman v. Bee Machine Co., Inc.*, from the instant case in that defendant Central Avenue Dairy, Inc., having been served with the cross-complaint outside of the State of California made no general appearance in response thereto. Appellant seems to think that all controversies between the parties should be adjudicated in one action even though the Court does not have jurisdiction of the person of the cross-defendant in respect to the cause of action alleged in the cross-complaint. This erroneous conception is set at rest by the decision in *Stitzel-Weller Dist., Inc., v. Norman*, *supra*.

Even though jurisdiction over the person of Central Avenue Dairy, Inc., in respect to the complaint in interpleader was properly obtained by personal service of process in Arizona pursuant to the provisions of Section

2361 of Revised Title 28, United States Code, and even though federal jurisdiction in respect to the cause of action alleged in the cross-complaint is predicated solely on diversity of citizenship and could, therefore, be commenced in the district in which the plaintiff resided (28 U. S. C. A. 112), there must be both proper venue and the service of the cross-complaint with summons thereon in the state in which the court is held.

In *Robertson v. Railroad Labor Board*, 69 L. Ed. 1119, the Court said at page 1122:

“It is obvious that jurisdiction, in the sense of personal service within a district where suit has been brought, does not dispense with the necessity of proper venue. It is equally obvious that proper venue does not eliminate the requisite of personal jurisdiction over the defendant.”

In *International Union etc. v. Tennessee Copper Co.*, 31 Fed. Supp. 1015, plaintiff sought an injunction against the defendants, that is, a judgment *in personam*; the Court said:

“It is my judgment that the service on each of these defendants outside of this district and in another state is void and therefore the service is quashed and the complaint dismissed as to those defendants.”

Conclusion.

None of the cases cited by appellant, all of which we have herein analyzed, holds that the jurisdiction over the person of a non-resident defendant in respect to an action in interpleader confers any jurisdiction over the person of such non-resident in respect to a cause of action set forth in a cross-complaint seeking a personal judgment against such non-resident. The decision in *Stitzel-Weller Dist., Inc., v. Norman, supra*, is the only case which considers the question here presented and the decision in that case, as well as sound reasoning, requires the affirmance of the judgment dismissing the cross-complaint of Evert L. Hagan.

Respectfully submitted,

BODKIN, BRESLIN & LUDDY,

By HENRY G. BODKIN,

*Attorneys for Central Avenue Dairy, Inc.,
Appellee.*



No. 12211

In the
United States Court of Appeals
For the Ninth Circuit

EVERT L. HAGAN, doing business as
EL REY CHEESE CO.,

Appellant,

vs.

CENTRAL AVENUE DAIRY, INC.,

Appellee.

Appellant's Reply Brief

EVERT L. HAGAN,
115 N. Eastern Avenue,
Los Angeles 22, Calif.,
In Pro Per.

FILED

1948

PAUL P. O'BRIEN, <



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No. 12211

Appellant's Reply Brief

PREFACE

The facts having been fully set forth in the former briefs filed herein, little could be added by further statements here. However, we take sharp issue with the statement contained on page 4 of appellant's brief in which it is stated:

“It is to be noted that Central Avenue Dairy, Inc., would be entitled to said deposit if Hagan breached his contract, but the breach of contract by Central Avenue Dairy, Inc., would not effect the rights of either to the deposit.”

for the reason that neither claimant could have sustained their claim to the fund deposited by the plaintiff in interpleader as against the other without first establishing a breach of the contract pursuant to which the funds originally were deposited with the plaintiff in interpleader. It therefore necessarily follows that a breach of the contract by either claimant would effect the right of all parties concerned. The defendant Central Avenue Dairy, Inc., by its failure to appear and answer the claim of the defendant, Evert L. Hagan, to the fund or set forth its claim thereto is deemed to have admitted its breach of the contract, which substantiated the defendant, Evert L. Hagan's claim.

Moreover, appellee throughout its brief, urges the court to accept the narrowest possible interpretation concerning the act governing the procedure for Federal District Courts and the limitation of their jurisdiction in matters relating to a cross claim filed by one defendant in an action in interpleader against a co-defendant in the same action, who had been properly served by the marshal in the district wherein such defendant resides, with a copy of the complaint and summons as provided by rule 4F.

Such interpretation does not appear to be logical nor within the intent of Congress at the time of the enactment of the rule of Federal Procedure if we bear in mind that the purpose of this enactment is to afford all parties the right to litigate all matters relating to the transaction or occurrence that is the subject mat-

ter and germane to the original action, thus permitting justice between all parties respecting all issues in a single suit and without the necessity of seeking additional relief in two or more jurisdictions throughout the several states.

It may be well to note that the act referred to was amended in 1936 giving to the Federal Courts jurisdiction to serve process in interpleader suits beyond its respective districts, but prior to this amendment it was the general rule that one claimant had the right to cross claim against another claimant in the same proceeding over the amount of the original stake. This fact must be presumed to have been within knowledge of and considered by the Congress at the time of the enactment—therefore Congress must have intended to give full jurisdiction to district courts to enable them to fully settle the entire controversy between all parties coming before it in actions in interpleader—otherwise such limitations would have been expressly reserved. In further support of what we have said we call attention to the modern trend of both the Congress and the Courts to permit all parties concerned to fully litigate all differences between them in one single action and to avoid a multiplicity of actions where the same subject matter is involved.

I.

SECTION 2361 OF REVISED TITLE 28 U. S. C. A. DOES AUTHORIZE AND WARRANT THE SERVICE OUTSIDE THE STATE IN WHICH THE DISTRICT COURT IS HELD OF A CROSS COMPLAINT FILED BY A DEFENDANT IN AN INTERPLEADER ACTION AGAINST A CO-DEFENDANT WHERE PERSONAL JUDGMENT FOR DAMAGES IS SOUGHT BY SUCH CROSS COMPLAINANT.

The questions covered in Point I of Appellee's Brief is essentially an objection to the jurisdiction of the District Court to entertain appellant's cross complaint against his co-complainant Central Avenue Dairy, Inc., with almost complete reliance being placed upon the authority contained in *Stitzel Weller Dist., Inc., v. Hartman*, 39 Fed. Supp. 182, therein cited but an examination of the same does not disclose that the non-resident defendants named in the cross complaints were named in, made defendants to, or served by a copy of the summons and complaint in the original interpleader action. It could reasonably have been that claimants, Norman and Hartman, attempted to join the remaining parties referred to by the court as co-defendants in the cross complaint only, and we notice further that this case was decided without reference to the new rules of Federal Procedure and particularly Rule 13G which we here quote:

“A pleading may state as a cross claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counter claim, therein, or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that the party against whom it is asserted is, or may be liable to the cross claimant for all or part of a claim asserted in the action against the claimant.”

which distinguishes the authorities cited with the instant cause as here, Defendant Central Avenue Dairy, Inc., was named and served as a defendant and jurisdiction was obtained over him by service of a copy of the complaint and summons in the original interpleader action. But whichever way the true facts may be in the *Stitzel* case, *supra*, a later case, *Bank of Neosho v. Calcord et al.*, 8 F. R. D. 621, decided Feb. 4, 1949 by the United States District Court in Missouri which cites and distinguishes the *Stitzel* case would appear to supercede the former upon sound logic and the application of Rule 13G of the Federal Rules of Procedure. In the latter case which was an interpleader action wherein the plaintiff was stake-holder of \$5000 given to secure the performance of a contract for the sale of land. The purchasers and the sellers were residents of Illinois and Oklahoma respectively. The stakeholder was a resident of Missouri. The seller refused to perform and the stakeholder, desiring to rid himself of the fund, filed an action in strict interpleader. The purchaser in addition to their claim upon the fund

sought to cross claim for specific performance of the contract of sale. The sellers moved to strike the cross claim for the reason that the Federal District Court had obtained no jurisdiction over them for the adjudication of anything other than the right to the stake in interpleader. The Court held:

1. Rule 22 Federal Rules of Procedure provided that interpleader actions were governed by the Federal Rules of Procedure.
2. That the provisions of Rule 22 made Rule 13G determinative of the issues on the motion to dismiss the cross claim.
3. That rule 13G gave the court jurisdiction to determine all of the issues arising out of the subject matter of the interpleader.
4. That the tendency of modern jurisprudence was to dispose of all issues germane to the controversy at hand and to prohibit multiplicity of actions.
5. That the *Stitzel Weller* case was not determinative of the motion before it because it was decided without reference to Rule 13G.
6. That the jurisdiction in an interpleader action is general and gives the court power to determine all germane issues regardless of the residence of the claimants in the interpleader, the court having obtained proper jurisdiction in the original interpleader action, and the cross claim before it arises out of the subject of the interpleader and should be heard.

The authorities cited appear to be substantiated by the greater weight of authority and we further submit that the court having acquired jurisdiction under and pursuant to Section 39C of the statute is released of the restriction to the effect that service outside the state in which the court is located would be without effect.

The aforementioned section provides that a corporation may be sued in any judicial district court in which it is incorporated or licensed to do business or is doing business and such judicial district court shall be recorded as the residence of such corporation for venue purposes.

By the affidavit of Ed A. Geare, President of Central Avenue Dairy, Inc., (Tr. 38) he admits that the transaction herein referred to constituted interstate business. And Exhibit A (Tr. 23) attached to the answer, claim and cross complaint of defendant, Evert L. Hagan, establishes that such business was transacted in both the states of California and Arizona—also by the terms of Exhibit A all shipments of products were to be made by Central Avenue Dairy, Inc., from the state of Arizona to Evert L. Hagan in California—thus the venue of this action is established to be properly placed in the District Court where the interpleader was originally filed.

Also Section 2361 of the statute providing that in any interpleader action the District Court may issue its process for all claimants and that such process shall

be addressed to and served by the United States Marshal for the respective districts wherein the claimants reside or may be found—also that said district court shall hear and determine the case and may discharge the plaintiff from further liability, make the injunction permanent and make all appropriate orders to enforce the injunction. Thus it appears that the district court had jurisdiction under the aforementioned authorities to try and determine all of the issues presented by the cross claim.

In the case of *United States ex rel. Foster Wheeler Corp. v. American Surety Co.*, 25 Fed. Supp. 700, it was held that when a counter-claim arises out of the same transaction as the main action it must be set up and the court has jurisdiction even though it would not have had jurisdiction if the counter-claim were set forth in an independent suit.

Rule 4F provides that all process other than subpoena, may be when a statute of the United States so provides, served beyond the territorial limits of the state in which the district court is located. The statute herein cited does so provide establishing jurisdiction of that court over the defendant Central Avenue Dairy Co., Inc.

In the case of *Equitable Society of the U. S.*, 42 Fed. Supp. 1022, it is held that the defendants have waived the question as to which one of them should be designated as plaintiff in the interpleader, and that such defendant occupies the position of plaintiff and

must state his own claims and answer that of the other. To the same effect see also *Security Tr. Co. v. Woodworth*, 76 Fed. Supp. 671.

It would appear from the foregoing that in order to arrive at a correct decision in this case, rules of statutory construction should be followed as a guide for which the following may be used as an example.

All laws should receive a sensible construction and general terms should be so limited in application as not to lead to injustice, oppression or absurdity. *U. S. v. Kirby*, 74 U. S. 482, 19 L. Ed. 278. The language of a statute must be given reasonable meaning in the light of generally accepted principles of law. *Safe Dep. & Tr. Co. of Baltimore v. Tait*, 3 Fed. Supp. 562.

A phrase which through judicial interpretation has a fixed meaning when bodily incorporated in a statute will be given that meaning in the statute unless a contrary intention appears. *Re Abbotsford*, 98 U. S. 440, 25 L. Ed. 168; *U. S. v. Jones*, 3 Wash. D. C. 209, and that the courts in construing the interpleader act must construe it liberally. *Hancock Mutual Life Ins. Co. v. Kegan*, 22 Fed. Supp. 326; *Metropolitan Life Ins. Co. v. Segaritis*, 20 Fed. Supp. 739.

II.

**A SUMMONS ATTACHED TO THE CROSS CLAIM
WHEN SERVED IN THE INSTANT CAUSE
WAS NOT NECESSARY.**

Appellee's contention discussed under Point II of its brief would be tenable only by applying California law to the instant case. However, their error lies in attempting to apply California law because the premise upon which they seek to apply state laws arises pursuant to Rule 5A which in part provides that process made upon parties in default for failure to appear as to new or additional claims for relief against them shall be served upon them in the manner provided for the service of summons in Rule 4 of the Rules on Civil Procedure. Rule 4, Subdivision (B)(7) provides that service upon a defendant such as Central Avenue Dairy, Inc., is sufficient if the summons and complaint are served in the manner prescribed by the laws of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. It thus appears that the law applicable to the questions raised by appellees is that of the State of Arizona instead of the State of California. And the law of the state of Arizona respecting the service of cross complaints does not contain any provision similar to Section 442 of the California Code of Civil Procedure to the effect that if any of the parties affected by the cross complaint have not ap-

peared in the action, a summons upon the cross complaint must be issued and served upon them, in the same manner as upon the commencement of the original action. The Arizona law respecting cross complaints to which we referred are contained in section 21-437 of the Arizona Code of Civil Procedure in superior courts and provides:

“Sec. 21-437 **COMPULSORY COUNTER CLAIMS.** A pleading shall state as a counterclaim any claim not the subject of a pending action which at the time of filing the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing parties claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, and

Sec. 21-433 **CROSS CLAIM AGAINST CO-PARTIES.** A pleading may state as a cross claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter, either of the original action or of a counter claim thereon. Such cross claim must include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of the claim asserted in the action against the cross complainant.”

It necessarily follows that since the appellant's cross claim arose out of the same transaction or occurrence, that is the subject matter and germane to the opposing parties' claim, it must be asserted at the time

of the answer or not at all. That the service upon Central Avenue Dairy, Inc., should be as provided in Section 21-313 and Section 21-305 of said Code, which provides that in actions against a corporation the summons may be served on the President, Secretary or Treasurer or any director thereof, or upon any agent appointed for that purpose, or by leaving a copy of the same at the principal office of the company during business hours. No provision contained in the Arizona code provides for the issuance of summons on a cross claim.

Service of Central Avenue Dairy, Inc., was entirely consistent with the Arizona statutes, so far as applicable, and consistent with the statutes of the U. S. respecting rules of civil procedure in district courts. (Rule 4-1.) And as further authority concerning this point, in Simpkins Federal Practice 3rd Ed. Sec. 320 page 301 we find the following:

“A cross claim may be served upon a co-party by serving it upon the attorney representing such co-party unless service upon the party himself is ordered by the court.” (Citing Rule 5B and 5C.)

New summons is not necessary. (Citing Rule 4A and 4D.) The marshal's return of service showing service on Central Avenue Dairy, Inc., of a copy of the cross complaint (Tr. 30) was in due form as affecting service on it by serving the duly authorized agent appointed for that purpose, and under Rule 4 the service of the original complaint and summons has been prop-

erly made and the court already has jurisdiction over the person, regardless of the fact of his appearance or non-appearance, and the court should be allowed to exercise that jurisdiction in connection with anything relating to the case and arising because of it. It, therefore, appears to be the logical meaning of the rule to permit complete justice between the parties without compelling them to settle their disputes concerning a single subject matter in two or more suits in different jurisdictions.

The remaining points discussed in appellee's brief have been fully met in our opening brief and we therefore conclude.

CONCLUSION

1. That under the general law of interpleader prior to 1936 one claimant could properly cross claim against another claimant.

2. When Congress passed the interpleader act of 1936 giving district courts power to issue process throughout the United States in interpleader actions, it must have conferred general jurisdiction in interpleader actions—and to hold otherwise would violate all rules of construction and arrive at an unjust and absurd result.

3. That no summons was necessary to be issued in order to bring the Central Central Avenue Dairy, Inc., properly before the court; and,

4. That under the authority of Rule 13G and the case of *Bank of Neosho v. Calcord, supra*, the district court in Los Angeles had jurisdiction and should have entertained the cross claim.

Respectfully submitted,

EVERT L. HAGAN,
In Pro Per.

No. 12211

In the
United States
Court of Appeals
For the Ninth Circuit

EVERT L. HAGAN, doing business as
EL REY CHEESE CO.,

Appellants,

vs.


CENTRAL AVENUE DAIRY, INC.,

Appellee.

Petition for Rehearing

FILED

JAN 25 1950

PAUL P. O'BRIEN, 
CLERK

EVERT L. HAGAN,
115 N. Eastern Avenue,
Los Angeles 22, Calif.
In Pro Per.

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Civil Procedure, is not in point. This was clearly pointed out by the decision in the case of *Bank of Neosho vs. Colcord*, 8 F. R. D. 621 (Western District of Missouri 1949) which held that Rule 13-G is conclusive as to the jurisdiction in interpleader, and is a correct statement of the law. The *Eschger, Ghesquier and Norman Case* is nowhere in point. In this case, one claimant was a subject of England, and the other a citizen of France. Naturally, no general jurisdiction could be obtained over the French citizen unless personal service was made in England. There can be no parallel drawn to this case, and the case at Bar, for in the case at Bar, the claimants are both citizens of the United States, and Congress, by the National Interpleader Act, conferred general jurisdiction in interpleader actions upon the District Court and gave these courts the power to issue process throughout the United States. The jurisdiction conferred is general, because the Interpleader Act in no manner limits or restricts it. Where interpleader process was served upon the claimant, Central Avenue Dairy, outside the State of California, and within the United States, it was before the District Court for all purposes. *Bank of Neosho vs. Colcord*, *supra*. In the *Eschger* case there was absolutely no way of obtaining jurisdiction of any kind over the citizen of France in France by the English courts.

II.

**THE CASE AT BAR CANNOT BE DISTINGUISHED
FROM THE BANK OF NEOSHO VS. COLCORD
CASE.**

The opinion attempts to distinguish the *Bank of Neosho Case* from the case at bar by saying that in that case "claimant against whom a cross-complaint was asserted, had already appeared to claim the fund deposited by the stake-holder."

If Congress had not already, by the Interpleader Act conferred upon the District Court the power to issue its process outside of the state wherein it was sitting, the appearance of a claimant in interpleader for the purpose of claiming the fund, would have given the Court jurisdiction. But, where Congress has given the Court the power to issue its process outside of the state wherein it is sitting, it gave it jurisdiction and the ability to obtain the same, independently of an appearance or non-appearance of a non-resident claimant. The District Court in Los Angeles obtained jurisdiction over the defendant, for the purposes of the action, by the service of process by the United States Marshal in Arizona, the same as the District Court in Missouri obtained it by serving process upon the Oklahoma claimant, in the *Neosho case*. The jurisdiction thus obtained was general jurisdiction over the party and the subject matter of the action, to determine all matters which were germane to the subject matter of the interpleader action. We quote from the *Colcord case* (8 F. R. D. 621, L. C. 624) :

“Claimants Waite assert, however, that being residents of the State of Illinois, they have entered a limited appearance in this interpleader action in which they have been made parties and are not subject to the jurisdiction of this court for any other purpose. An answer thereto is, that a Court in interpleader acquires general jurisdiction of the subject matter and of the parties. . . . (Underlining ours). The jurisdiction so acquired authorizes the adjudication of all issues arising between the parties, whether legal or equitable, and the process for the adjudication of such issues is made subject to the procedure set forth in the Rules of Civil Procedure.

“Claimants Waite further assert that they being citizens of the State of Illinois, and claimants Colcord and Hutchinson being residents of the State of Oklahoma, this court cannot acquire jurisdiction of the parties or subject matter involved in the cross claim. Holding, as we do, that the subject matter of the cross-claim here filed arises out of the same transaction or occurrence that is the subject matter of the original action, the subject matter of the cross-claim is auxiliary to the subject matter of the original action and on that premise the Court has jurisdiction thereof.”

III.

THE COURT, AFTER OBTAINING JURISDICTION TO DETERMINE THE RIGHT OF PARTIES AS TO THE FUND DEPOSITED, HAD TO JUDICIALLY DETERMINE WHETHER OR NOT THERE HAS BEEN A BREACH OF THE CONTRACT OUT OF WHICH THE ESCROW AROSE, IN ORDER TO GRANT A DEFAULT JUDGMENT TO EVERT L. HAGAN.

The Court awarded judgment in favor of Evert L. Hagan, upon his claim of the funds, which claim arose solely from the breach of the contract out of which the escrow arose, Central Avenue Dairy. It was stated in both the opinion and the concurring opinion that there was nothing before the Court to determine, regarding the breach of the contract, that such determination was not necessary upon the interpleader action, and therefore, the damages for the breach could not be adjudicated upon the cross-claim, for which, the Court said, there was no independent jurisdiction. It must be remembered that the original interpleader arose by virtue of a suit brought by the Title Insurance and Trust Company, alleging that both Evert L. Hagan and the Central Avenue Dairy claimed the deposit. Evert L. Hagan answered, and claimed the fund solely by virtue of a breach of the contract, out of which the escrow arose, by the Central Avenue Dairy. That was the record that was before the District Court. The Central Avenue Dairy, though served, declined to deny the allegations and claims set

A general study of default judgments as to whether or not they constitute a judicial determination or *res adjudicata*, is to be found in 128 A. L. R. 472. In this study it is said:

“It is a well settled general rule that a judgment by default may be the basis of a plea of *res adjudicata* or estoppel in a subsequent action involving the same matter, and that such a judgment is just as conclusive upon whatever is essential to support it as is a judgment rendered after answer and contest.”

Cited in this annotation are many, many United States Supreme Court and Federal Circuit Court decisions, see 128 A. L. R., p. 474.

Petitioner submits that if the default judgment entered was one which necessarily had to be supported by the allegations that the Central Avenue Dairy had breached the contract, out of which the escrow agreement arose, that it is a judicial determination that the Central Avenue Dairy had breached the contract. Upon what other ground could it have given Hagan judgment? Germane to this finding was the question of damages which were suffered in addition by Evert L. Hagan, which resulted from the same breach of the same contract.

IV.

THIS COURT SHOULD EITHER GRANT A RE-HEARING OR SHOULD CERTIFY THE QUESTION HEREIN INVOLVED TO THE SUPREME COURT OF THE UNITED STATES FOR A SETTLEMENT OF IMPORTANT QUESTIONS OF LAW.

The real distinction between *Bank of Neosho vs. Colcord, supra*, and the decision of this Court in the case at Bar, is not one of different facts, but a difference of judicial philosophy in construing the National Interpleader Act and the Federal Rules of Civil Procedure. There is presented an important question of Federal jurisdiction, which should be determined by the highest Federal authority. Therefore, the question, if not re-heard by this Court, should be certified to the Supreme Court of the United States. Then, and only then, can this question be settled once and for all.

Respectfully submitted,

EVERT L. HAGAN,

In Pro Per.

**CERTIFICATION TO PETITION FOR
RE-HEARING.**

EVERT L. HAGAN, acting in pro per, hereby certifies under Rule 25 of the U. S. Circuit Court of Appeals, for the Ninth Circuit, that he truly believes that this petition for re-hearing is well founded, and that it is not interposed for mere delay.

EVERT L. HAGAN.

United States
Court of Appeals
For the Ninth Circuit

S. P. BEECHER,

Appellant,

vs.

THE LEAVENWORTH STATE BANK
and THE FEDERAL LAND BANK
OF SPOKANE,

Appellees.

BRIEF FOR APPELLEES

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Filed **FILED**, 1949.

JUN 21 1948, Clerk

PAUL P. GERTEN,
CLERK



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STATEMENT OF THE CASE

The appeals by appellant, farm debtor, are from the following orders:

(1) Order of April 9, 1948, terminating the stay order of May 6, 1946 (12084 Vol. 5, 1170 to 1175).

(2) Order of District Judge of December 20, 1948 (12216 Vol. 2, 275-6), affirming order of Commissioner of June 1, 1948 (12216 Vol. 1, 67 to 73), fixing the value of property for redemption purposes.

The first order was among those appealed in Cause 12084, in which appellees moved for dismissal of the appeal from said order.

The argument in this cause is subject to the said motion to dismiss the appeal.

ARGUMENT

THE ORDER OF APRIL 9, 1948, TERMINATING THE STAY ORDER FOR THE REFUSAL OF BANKRUPT TO FILE AN ACCOUNTING OF CROPS RAISED DURING THE STAY PERIOD IS JUSTIFIED BY THE RECORD.

On May 6, 1946, appellant was placed in possession of his property under a stay order which provided that during the three-year period he was permitted to retain possession of his property "in the custody and under the supervision and control of the court" and that such possession is contingent upon his pay-

ing a reasonable rental to be determined in the manner prescribed by law (12084 Vol. 1, 176 to 178).

Thereafter, at a meeting of creditors called for the purpose of determining rental to be paid, the Commissioner, by order of June 25, 1947, determined that 40% of the net proceeds of crops raised on the orchard property was reasonable rental, and directed the debtor to maintain accurate records showing the moneys disbursed in producing the crops, which payments were to be made by check, and also to keep an accurate record of all sales of produce made by debtor, showing the kind and amount sold, the amount received therefor, the date of sale, and the party to whom the produce was sold (12084 Vol 2, 328 to 334).

The Summary of Evidence heard by the Commissioner (12084 Vol. 2, 325 to 328) shows that debtor testified that in the vicinity of the property there was no land which was rented for cash rental and that the customary rental for such lands was a percentage of the net proceeds of crops raised and, further, that debtor testified that 40% of net proceeds was the customary rental. The Commissioner accepted the evidence of debtor as the basis for fixing the rental. The requirement that debtor should keep a record of produce sold and moneys expended was necessary because, without this record, there would be no way of determining what 40% of the net proceeds was. Debtor entered into possession of the property on May 6, 1946, and during the years 1946 and 1947

raised valuable crops of fruit thereon. He filed no reports as to the production and expenditures, but deposited in court \$9170.00 to effect a redemption (12084 Vol. 1, 203).

The creditors requested a reappraisal, and debtor petitioned for withdrawal of his petition to redeem, which was granted by order of December 10, 1947 (12084 Vol. 2, 491).

The court, however, directed that the moneys remain in the registry of the court. This was done under the power of supervision and control vested in the court. On January 5, 1948, debtor filed a petition asking that his request for payment out of the funds in court to creditors be withdrawn and, as ground therefor, stated that the moneys were probably necessary for production of 1948 crop (12084 Vol. 4, 934 to 937).

Although two crop seasons had passed since he was placed in possession under the stay order, no report of farming operations had been filed, and debtor had neither paid nor tendered any sum as rental. The court, on its motion, on January 8, 1948, entered the order requiring debtor to file a report of his farming operations for 1946 and 1947 and to endorse and deposit with the clerk all uncashed checks held by him which were the proceeds of crops raised after the stay order (12084 Vol. 4, 939 to 944).

The order recites the reasons therefor, namely, that the court could not tell whether the moneys in court

should be paid to creditors, could not determine whether the moneys in the registry of the court were necessary for production of 1948 crop, and had no way of knowing whether the moneys in court, or some part thereof, were in fact rental and should go to the creditors. Debtor did not comply with the order of court of January 27, 1948, wherein the court directed the filing of a report and the endorsement of uncashed checks on or before February 10, 1948 (12084 Vol. 5, 1064).

For failure to comply with said order, the Court, on April 9, 1948, entered an order finding debtor guilty of contumacious conduct and terminated the stay order (12084 Vol. 5, 1170 to 1175).

Debtor had almost four months' time within which to comply with the court's order, but elected to defy the court, acting on the theory that neither the creditors nor the court had any right to supervise or control his management of the property or the proceeds of crops raised.

At the hearing on January 27, 1948, Mr. Beecher was present, and the proceedings are reported in 12084 Vol. 4, 948 to 1000, and Vol. 5, 1001 to 1056. From these proceedings it appears that debtor brought into court a number of cancelled checks and claimed this was the report he expected to make; that the crops were not all sold to Wade & Co., but the cherries and apricots were sold to others, and that debtor had \$1903.00, proceeds thereof, in a safe deposit box.

All through this record it appears that the court was trying to impress on debtor that the law placed on the court the responsibility of supervision and control of the property, and that to perform this duty the court must have a report as to receipts and expenditures, and that the money should be under the supervision and control of the court until the rental was determined. This record further shows that debtor took the stand that the management of the property and the custody of moneys and the payments therefrom were no concern either of the creditors or of the court.

In *Rafert vs. Equitable Life Assurance Society*, 138 Fed. (2) 185 (C. A. 8th), the debtor refused to pay the rental into court when ordered to do so. For such refusal the district court terminated the stay order.

Affirming the order of the district court in *In re Rafert*, 48 Fed. Sup. 459, the Court of Appeals said:

“He simply and recalcitrantly refused to pay the rentals into court when he received them. He chose to defy the court’s order and to take the chance that such orders are void * * * Such conduct justified the order of court terminating the three-year stay order unless he obeyed its orders within the reasonable time granted.”

In *Worley vs. Wahlquist*, 150 Fed. (2) 1007 (C. A. 8th), the appeal was from an order that debtor had contumaciously failed to comply with the rental order, and required her to file a complete accounting

of all crops raised and to make payment into court within 15 days of all rents due, and terminated the stay order unless she made the accounting within 15 days.

Affirming the order terminating the stay, the court said:

“We need not enumerate all the circumstances appearing in the record and detailed in the trial court’s memorandum opinion that demonstrate her wilful refusal to recognize the court as her landlord, under section 75, subsection s(2), 11 U. S. C. A. sec. 203, sub s(2), placing her property ‘in the custody and under the supervision and control of the court.’ Among her perversities, she had made no rental payments whatever into court at the time the hearing was held in December, 1943, although she admittedly had harvested and sold some of the crops and had also collected soil conservation payments and other rental monies; * * *

“The validity and propriety of that part of the court’s order terminating appellant’s right of stay, if she did not obey the accounting and payment order and absolve her current recalcitrances, is similarly not open to attack on the facts in the record.”

Appellant urges on page 12 of his brief that the assistance of the Commissioner was necessary for the determination of income tax, the segregation of operating and upkeep expenditures, depreciation, allowances to the debtor as salary. None of these matters were within the requirements of the order of court. The court simply asked debtor to put on paper

a statement showing what fruit he had produced, what payments were made and to whom paid. The matter of income tax (if he had paid any), the salary, if any, to be allowed debtor, and whether the expenditures were for operating or for upkeep, were all matters to be considered at a future hearing. The records were all debtor's records, and the Commissioner could have been of no assistance in compiling the report.

If the custody, supervision and control vested in the court under Section 75(S)(2) of the Bankruptcy Act and the proviso of Section 75(S)(3) of said Act "if the debtor at any time fails to comply with the provisions of this section or with any orders of court made pursuant to this section * * * the court may order the appointment of a trustee and order the property sold" means anything, it means that the court after the entry of the stay order has the right to know what crops were raised by the debtor and what expenditures were made in producing the crop when the rental is based on a percentage of the net proceeds, and that the refusal of the debtor, as in the case at bar, to comply with the order requiring a report justifies the court in terminating the stay.

THE ORDER OF COMMISSIONER OF JUNE 1, 1948, FIXING THE VALUE OF PROPERTY FOR REDEMPTION PURPOSES IS SUPPORTED BY THE RECORD.

The Commissioner, in holding a hearing at Wenatchee to determine the value of the property for redemption purposes, did not act pursuant to the order of April 9, 1948, terminating the stay. The record shows that on August 4, 1947, The Federal Land Bank of Spokane filed a petition for a reappraisal (12084 Vol. 1, 216), and on August 7, 1947, the Leavenworth State Bank also filed a like petition (12084 Vol. 1, 218).

On January 27, 1948, the debtor filed a petition for a reappraisal (12084 Vol. 5, 1058).

Thus, on January 27, 1948, both the creditors and the debtor were requesting the court to have a reappraisal made.

On January 27, 1948, the court granted the request of debtor and his creditors for a reappraisal, and referred the proceeding to the Commissioner to hold a meeting and, in lieu of reappraisal, to hear the evidence and therefrom to determine the value of the property. This order is in 12084 Vol. 5, 1062.

Section 75(S)(3) of the Bankruptcy Act vests in the court the discretion to have the value determined by the Commissioner instead of by an appraisal. The reasons given by the court were that neither party would be satisfied with a reappraisal and that eventually the matter would have to be determined by the court from evidence because there was such a difference between the parties as to the value of the orchard property (12084 Vol. 4, 958 to 959).

Pursuant to the order of January 27, 1948, the Commissioner called a meeting to be held at Wenatchee on May 3, 1948. On April 30, 1948, debtor filed an application for continuance. On May 3, 1948, the Commissioner adjourned the hearing to the home of debtor where debtor was examined as to his illness, and the Commissioner continued the hearing to May 26, 1948 (Tr. 12216, Vol. 1, 1 and 2).

On May 26, 1948, a representative of debtor appeared at the hearing with a request for a continuance, and the continuance was denied; after which evidence was admitted and therefrom the Commissioner fixed the value as stated in his order of June 1, 1948 (12216 Vol. 1, 67 to 73).

This order was affirmed on petition for review by the district judge on December 20, 1948 (12216 Vol. 2, 275-6).

We shall confine this part of our brief to a consideration of the question of whether the evidence supports the findings of the Commissioner.

The Commissioner found that the orchard property was more valuable as a whole than as separate tracts, because the irrigation system was so constructed as not to be capable of being divided, and that the buildings were on one tract. The evidence of all the witnesses called was to this effect, and that the fair, reasonable value of the orchard property was \$50,000.00. No evidence was offered of a lesser value.

Appellant states on page 1 of his brief that he believes the value of the property could have been reduced to less than \$15,000.00. During the crop year of 1945, which was the year preceding the delivery of possession to debtor, the orchard property was operated by a receiver. His report for period from March 1, 1945, to February 28, 1946, shows that the sale value of fruit raised on the orchard property was \$51,808.60, and that the expenses were \$33,452.61, leaving a net profit on crops raised in 1945 of \$18,355.99 (12084 Vol. 1, 236).

Appellant submitted a budget for farm operations for year 1948 on the orchard property of \$40,350.00 (12084 Vol. 5, 1059-1060).

We submit a property which under a receiver produces a net profit of \$18,355.99 in one year must be worth in excess of \$15,000.00.

It will be noted that the claim of The Federal Land Bank of Spokane is based on a certificate of sheriff's sale held prior to the filing of a petition in this proceeding and is based on mortgage shown in 12216 Vol. 1, 43. The claim of Leavenworth State Bank is based on judgment recovered in foreclosure of a mortgage shown in 12216 Vol. 1, 37.

Under these circumstances the Court of Appeals for the Tenth Circuit in *Paradise Land & Livestock Co. vs. Federal Land Bank of Berkeley*, 140 Fed. (2) 102, held that debtor must redeem the mortgaged

property as a unit and not by separate tracts constituting the unit.

THE DISTRICT JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING A CONTINUANCE OF THE HEARING HELD JANUARY 27, 1948, AND THE HEARING HELD MARCH 29, 1948, AND THE COMMISSIONER DID NOT ABUSE HIS DISCRETION IN DENYING CONTINUANCE OF HEARING HELD MAY 26, 1948.

By order of January 8, 1948, the court entered the order directing the filing of report by January 27, 1948, and also required a showing on that date why certain uncashed checks should not be endorsed and delivered to the clerk (12084 Vol. 4, 939). An unverified motion for a continuance was filed on January 12, 1948 (12084 Vol. 4, 944) which was denied on January 15, 1948 (12084 Vol. 4, 947).

The motion was not supported by any doctor's affidavit or certificate and the debtor appeared on January 27, 1948, and participated vigorously in the hearing.

Regarding the hearing of March 29, 1948, the record shows that on February 13, 1948, the court entered a show cause order returnable February 25, 1948, requiring debtor to show cause why the stay order should not be vacated (12084 Vol. 5, 1083). This hearing was continued on debtor's application therefor to March 29, 1948 (12084 Vol. 5, 1089). On the date of hearing debtor was not present. The Clerk

on the morning of said day filed an unverified petition for a continuance to which was attached an unverified statement by a doctor. The court held the application was not timely and also that the showing was not sufficient.

Regarding the action of the Commissioner in denying application for a continuance of hearing adjourned to May 26, 1948, the record shows this hearing was set originally for May 3, 1948. On this date, the debtor not being present, the Commissioner adjourned the hearing to May 26, 1948, after first examining debtor as to the extent of his illness. The application for continuance of hearing May 26, 1948, was supported only by the unverified statement of a doctor dated May 19, 1948, 7 days prior to the hearing (12084 Vol. 5, 1233).

That debtor had kidney trouble will be conceded. The question is whether his health was such that he could not be expected to attend the hearing. It will be noted that neither the motion for continuance of the hearings set before the district judge nor the certificate of the doctor in support thereof was verified, and debtor appeared and participated in the hearing of January 27, 1948.

The exhaustive record of this hearing shown in 12084 Vol. 4, 948 to 1000, and Vol. 5, 1001 to 1056, shows that debtor was in possession of all his faculties. At this hearing with reference to his illness debtor stated "He (Dr. Ramsey) said there's noth-

ing vitally wrong with me * * * that I was to be quiet and keep warm and eat carefully.” (12084 Vol. 4, 957).

On May 3, 1948, the Commissioner examined debtor as to his physical condition. It was raining, but debtor was willing to show the property to Commissioner; debtor stated he was in Seattle April 26, 1948, and worked in a law library from 10:00 a.m., to 1:00 p.m., and exhibited 12 pages of notes taken while there. The debtor seemed mentally alert (12216 Vol. 1, 8 to 10).

The Commissioner continued the hearing out of desire to give debtor benefit of any doubt as to his illness. At the hearing May 26, 1948, D. J. Kenaston testified he made an inspection of the property on March 29, 1948; that debtor drove up shortly after he arrived; that debtor showed him over the property, including the houses, and that he was physically active and mentally alert. At that time debtor stated he was supposed to be in Spokane for a hearing, but did not think he was able to go (12216 Vol. 1, 11 to 12). This evidence is corroborated by that of Thomas S. Roddy who accompanied Mr. Kenaston (Vol. 1, 13 to 16).

In *Dietrich vs. U. S. Shipping Board*, 9 Fed. (2) 733 (C. A. 2nd) at 746, the rule regarding continuances in Federal courts is stated as follows:

“The continuance of a pending action or of its postponement is inherent in all courts and is

generally a matter resting in the court's discretion and reviewable only for abuse * * * and generally the facts upon which an application for a continuance is based must be verified by affidavit unless they are within the judicial knowledge of the court and not open to dispute."

In *Druckman vs. Forsyth Furniture*, 22 Fed (2) 59 (C. A. 4th), application for a continuance was made on the unverified certificate of a doctor that defendant was under his professional treatment with rheumatic arthritis and that it would be several weeks before he would be able to leave town. The court denied the application for continuance.

In affirming the denial, the court said:

"It is unnecessary to cite the numerous decisions which hold that a continuance of the cause rests in the sound discretion of the trial court. The judge who has had the cause before him for a number of years, and who has the attorneys before him, is of course in much better position to determine whether an application apparently fair on its face is in reality not bona fide, but for purposes of delay, than any appellate tribunal could possibly be. In this case, the same judge who heard the case originally and before whom the various motions for continuance had been made, presided at the last trial, and heard the motion for the continuance. We see nothing in the record before us to justify the conclusion that his discretion was not properly exercised."

In *Clark vs. Small* (175 S. E. 475 (Ga.)), it was held that the condition of health of a party at time of trial must be shown to justify a continuance and that one dated four days prior thereto was insuffi-

cient. It will be noted that the certificate of doctor relied on for continuance of the hearing set before the Commissioner is dated 7 days prior to the hearing.

When all the facts regarding debtor's illness are considered, we submit the court and Commissioner exercised a sound discretion in denying the continuances.

On pages 32 to 45 of his brief, appellant has assigned certain supplemental specifications of error. Such thereof as are pertinent to the orders involved in this appeal have been considered. Others pertain to the orders appealed in cause 12084, which have been briefed in that cause and will not be repeated in this brief.

CONCLUSION

Debtor filed his petition for composition and extension in 1939, and this proceeding has been in court for 10 years. During the period from May 6, 1946, when the second stay order was entered, debtor has been in possession of his property under a three-year stay order. He produced valuable crops in 1946, 1947 and 1948. The rental order provided for the payment of 40% of the net proceeds of crops raised as rental. No report as to crops raised has ever been filed, and no rental has ever been paid. The court, under its power of supervision and control, was clearly within its right to require debtor to file the reports, and the persistent refusal of debtor to comply with said or-

der was such conduct as justified the court in vacating the stay order.

The order directing a reappraisal was entered on the request of the creditors and on the written application of debtor therefor, and the evidence, particularly the production record of the property, supports the finding as to value.

We submit there is no error in the record, and the orders appealed should be affirmed.

Respectfully submitted,

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Appellee.

United States
Court of Appeals
 For the Ninth Circuit

S. P. BEECHER,

Appellant,

vs.

THE LEAVENWORTH STATE BANK
 and THE FEDERAL LAND BANK OF
 SPOKANE, et al,

Appellees.

*Appeal from the District Court of the Eastern
 District of Washington, Northern Division*

On Petition for Rehearing

BRIEF OF APPELLEES

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THE FRANKLIN PRESS, SPOKANE

FILED

DEC - 5 1950

PAUL P. O'BRIEN,
 CLERK

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STATEMENT OF THE CASE

On October 28, 1950, the Court entered an Order granting Appellant's Petition for Rehearing but limited solely to the question as to the date at which the property is valued.

The record shows that on January 27, 1948, the Court entered an Order granting the request of the Debtor and his creditors for reappraisal and referred the proceedings to the Commissioner to set a date for the hearing of evidence as to the value of the Debtor's property, and to fix the value of the Debtor's property in accordance with the evidence submitted (Tr. 12084, Vol. V, p. 1062).

On April 9, 1948, the Court entered an Order terminating the stay and ordered the proceedings to be referred to the Conciliation Commissioner for the purpose of determining the value of the property in accordance with the Order of the Court entered on January 27, 1948, and after determining the value of the property from the evidence, to fix a reasonable time within which the Bankrupt shall redeem (Tr. 12084, Vol. V, p. 1170, 1174).

The proceedings which led up to the making of this Order are found in the Record, No. 12084, and are as follows:

August 2, 1947, Farm-Debtor filed a document entitled "Petition and Tender of Money on Redemption" (Tr. Vol. I, p. 201).

August 7, 1947, The Federal Land Bank filed its Petition for Reappraisal (Tr. Vol. I, p. 216).

August 9, 1947, The Leavenworth State Bank filed its Petition for Reappraisal (Tr. Vol. I, p. 218).

January 27, 1948, Farm-Debtor filed his Petition for Reappraisal (Tr. Vol. V, p. 1058).

January 27, 1948, the Court ordered that the Petitions of the creditors and of the Debtor be granted, and instead of reappraisal, the Court directed that the value of the Debtor's property be fixed after hearing in accordance with the evidence submitted (Tr. Vol. V, p. 1062).

April 9, 1948, the Court entered an Order terminating the stay (Tr. Vol. V, 1170-1175).

Pursuant to the Order of January 27, 1948, the hearing after several continuances was finally held at Wenatchee on May 26, 1948 (Tr. 12216, Vol. I, 1 and 2). Evidence was taken and the Commissioner fixed the value as stated in his Order of June 1, 1948 (Tr. 12216, Vol. I, 67 to 73). The Order was affirmed on Petition for Review by the District Judge on December 20, 1948 (Tr. 12216, Vol. II, 275-6).

Attached to the Appellant's Brief is a Petition by Farm-Debtor to redeem and for reappraisal filed the 7th of February, 1948.

It will be noted that this Petition was filed with the Conciliation Commissioner eleven days after the Court had already entered the Order of January 27,

1948, directing a reappraisal of the property of the Farm-Debtor, on petitions filed by the Farm-Debtor and the creditors.

The Petition of the Farm-Debtor to redeem and for reappraisal filed with the Conciliation Commissioner February 7, 1948, is a nullity for the reason that the Court had already entered an Order on January 27, 1948, on the Petition of the Farm-Debtor and the creditors granting their request for a reappraisal. Farm-Debtor could not generate any rights in himself by requesting the Court to do that which the Court had already ordered done.

THE AMOUNT PAYABLE FOR REDEMPTION OF THE ORCHARD SHOULD BE FIXED AS OF THE DATE OF THE TERMINATION OF THE STAY.

The date as of which the property is to be valued under the circumstances of this case, is as of the date of the termination of the stay for the reason that the rights of the Debtor are fixed as of the date of the termination of the stay whether by lapse of time or by Order of the Court.

In the case of the *Federal Farm Mortgage Corporation v. Paulsen*, 149 F. (2) 897 (9 Cir.), it appeared that the Debtor failed within the three year period to redeem the property by paying the appraised value. The Referee decided under date of December 12, 1943, that the stay had expired on March 25, 1943. The Debtor had failed to pay into Court the appraised value of the property and had not sought reappraisal

within the three year period. Meanwhile on September 23, 1943, the Debtor filed a Petition for Reappraisal. The Court held that the Debtor's rights were fixed as of the termination of the stay and that thereafter he did not have the right to reappraisal.

The Court said that "If at the end of the three years the Debtor has not paid into Court the appraised value of the property, and if neither he nor any of his creditors have demanded a reappraisal, the stay ceases to be operative and the right to redeem at the appraised figure terminates."

In the present case, the Order setting aside the stay was entered April 9, 1948 (Tr. 12084, Vol. V, 1170-1175), whereas the Order directing a reappraisal was entered by the Court on January 27, 1948 (Tr. 12084, Vol. V, 1058).

Therefore the value should be determined as of the date of the termination of the stay for the reason that the rights of the parties became fixed as of that date.

This is borne out also by the case of *Haun v. Second Alliance Trust Co. Ltd.*, 155 F. (2) 618 (9 Cir).

In this case the Court pointed out that the proviso relating to reappraisals, Sec. 75 (s) (3), does not in terms require that the request for reappraisals be made within the period of the stay. But the Court went on to say:

“In the case of debtor, however, he must necessarily ask a reappraisal within the period if he desires to redeem and is dissatisfied with the existing valuation placed upon the property. The compulsion grows out of the circumstances that his right to redeem is lost if not exercised within the time provided unless at the termination of the period reappraisal proceedings are pending. *Federal Farm Mortgage Corporation v. Paulsen*, (9 Cir.) 149 F. (2) 897. But the creditor is not under similar compulsion. His role is passive; like the debtor, his right to reappraisal is absolute, but unlike the debtor, he is not placed by the statute under the necessity of demanding the right within a fixed period of time. If he acts promptly after the debtor indicates his purpose to redeem, we think the Court is not only empowered, but is probably required to cause a reappraisal to be made at the creditor’s request.

* * *

“After the reappraisal is had, the debtor is given the right by the express terms of the section, to pay into Court the value so placed upon the property, and to receive title to the same free and clear of encumbrances. The necessary implication of the statutory language is that this may be done within such reasonable time after the reappraisal as the Court may fix.”

Wright v. The Union Central Life Insurance Co., 311 U. S. 273, does not support Appellant’s contention that reappraisals must be as of the date of redemption, because it is obvious, and the Courts have so held, that the Farm-Debtor is entitled to know before he attempts to redeem, how much money he will have to raise or borrow to effect a redemption, and therefore the appraisal must always be made before the redemption.

In the Wright case, *supra*, the Court stated the issue involved as follows:

“The only issue presented by this Petition for certiorari, and which moved us to grant it, is whether under Section 75 (s) (3), the debtor must be accorded an opportunity on his request to redeem the property at the reappraised value or at a value fixed by the Court before the Court may order a public sale.”

In this case the Respondent had filed a petition praying that the proceedings be dismissed because of the failure of the Farm-Debtor among other things, to comply with the orders of the Court requiring the payment of rent, etc. The Debtor filed both an Answer to the petition and a cross-petition under Section 75 (s) (3), to have the land appraised or a date set for hearing, and after hearing evidence, to have its value fixed, and to be allowed to redeem at that value.

The Respondent answered, alleging that the Debtor was not entitled to redeem at such value, and that by the terms of Section 75 (s) (3) its request for a sale took precedence over any such right of the Debtor.

The lower Court ordered the property sold at public sale.

The Supreme Court held that a denial of an opportunity by the Debtor to redeem as a figure fixed by the Court before a public sale, was error, it appearing that the request for reappraisal by the Debtor had been made within the three year period, but the

inference from this case is that the value was to be fixed as of the date of the termination of the stay, for the Court said, page 280:

“The power of the Court to ‘order the property sold or otherwise disposed of as provided for in this Act,’ cannot be taken to mean a discretionary power to terminate the proceedings through the exclusive devise of a public sale. Congress has provided that certain contumacious conduct on the part of the debtor or his inability to refinance himself within three years may be an appropriate basis for a termination of the proceedings or for an acceleration thereof. We cannot infer, however, that Congress intended that such facts should have any further legal significance under the Act. To hold that they empowered the court to deprive the debtor of his express and fundamental statutory right to redeem at the reappraised value or at the value fixed by the court would be to imply a power of forfeiture wholly incompatible with the broad design of the Act to aid and protect farmer-debtors who were victims of the general economic depression.”

In other words, all the Wright case held was that the Farm-Debtor should be accorded the right to redeem at the reappraised value or at a value fixed by the Court before the Court may order a public sale. It did not specifically state the date when the valuation should be made, but the inference is quite clear from the whole case that the Debtor and the creditors are entitled to have the valuation fixed as of the date of the termination of the stay.

ANY DATE FOR THE DETERMINATION OF
THE AMOUNT PAYABLE FOR REDEMPTION

OTHER THAN THE DATE OF THE TERMINATION OF THE STAY SHOULD BE FIXED BY THE TRIAL COURT IN THE EXERCISE OF ITS INHERENT EQUITY POWERS AFTER A SHOWING AS TO THE NECESSITY THEREFOR.

In this case the value was fixed at the approximate date of the termination of the stay order, the Order terminating the stay having been entered on April 9, 1948, and the hearing having been held before the Conciliation Commissioner on May 26, 1948.

Because of the Debtor's alleged illness, this Court has reversed the Order of the Conciliation Commissioner denying a further continuance of the hearing and set aside the Order with respect to the valuation.

In the meantime it is perfectly proper to point out that the Farm-Debtor took all the time that an indulgent Court would grant before perfecting his appeal, with the result that between the date upon which the Order fixing the value was entered on June 1, 1948, and September 14, 1950, when the Decision of this Court was filed, two years, three months and thirteen days have elapsed. By the time the matter is finally determined upon rehearing, it probably will be nearly three years since the Order terminating the stay was entered. During that time the Farm-Debtor has methodically neglected his orchard property with the deliberate purpose of depreciating its value in every way he can. He has neglected to make the repairs authorized by the Conciliation Com-

missioner on his dwelling house. During the year 1950, by his own statement, he took practically no care of the orchard whatsoever.

We submit that if a date other than the date of the termination of the stay is to be fixed for the purpose of determining the value of the property of the Farm-Debtor for the purpose of redemption, that the Court should take into consideration the fact that the Farm-Debtor has deliberately neglected the orchard in order to depreciate its value since that date.

That record of course is not before the Court, but we sincerely believe that it is proper to call the Court's attention to it, and therefore we have filed in this case and submit for the consideration of the Court, certified copies of the following documents, to-wit:

(1) Petition of the Farm-Debtor to Spray Orchard dated July 19, 1950, in which he admits that no spray has been applied this season, and that serious damage is expected to the crop as well as to adjoining orchards.

(2) Certificate of Conciliation Commissioner on Order Made and Entered on August 4, 1950, on Petition of the Farm-Debtor for authority to Spray Orchard, which reveals the fact that the Farm-Debtor had deliberately let the orchard go to pot.

(3) Order to Show Cause issued by Judge Driver requiring the Farm-Debtor to appear and show cause why he should not be punished for contempt for failure to obey orders of the Conciliation Commissioner.

(4) Report of Frank Springer on the condi-

tion of the Farm-Debtor's orchard.

(5) Order of the Judge on Farm-Debtor's Petition for Review of the Order of August 4, 1950. In this Order the Court finds as a fact, that the Farm-Debtor has neglected to prune or spray or to do any thinning work on the orchard property during the season of 1950; that only a very small part of the orchard had been irrigated, and that lack of water was evidenced by the fact that the trees were in a wilted condition. That the apples were very wormy and in such condition due to no thinning, no irrigation and no spraying, that it was doubtful whether the apples could be harvested for sufficient to pay for the cost of harvesting. That the Farm-Debtor has definitely neglected to perform the usual and customary work of pruning, cultivating, fertilizing, spraying and thinning on said orchard during the crop year 1950; that the Farm-Debtor in open Court refused to use or cause to be used any of the funds in his possession for the purpose of doing any of the required work upon said orchard.

From this Order the Farm-Debtor appealed on October 2, 1950.

It would work a grave injustice upon the creditors in this case if the Farm-Debtor, because of delays for which the creditors were in no way responsible and because of the Farm-Debtor's deliberate effort to depreciate the value of the property, were permitted to redeem at a valuation fixed as of the present time. That would permit the Farm-Debtor to profit by his own wrong.

All of these facts are shown by the certified copies above referred to and we trust that the Court will

take them into consideration in determining the question involved.

If the date of the termination of the stay is not fixed as the date upon which the valuation should be found, we submit that such date should at least be left to the judgment and discretion of the Trial Court who can hear evidence with respect to the conduct of the Farm-Debtor in depreciating the value of the orchard property since the termination of the stay, and fix a date for the valuation of the property which will do justice to both parties.

In *Wright v. Union Central Life Insurance Co.*, 126 F. (2) 92 (7 Cir.), the Court points out that there necessarily must be vested in the trial court very broad discretion in fixing the date as of which the valuation of the Farm-Debtor's property may be made. The Court there points out that the power of the Court to order reappraisal is inherent in equity principles, and that the facts in each case must guide the Court. "Equity alone measures the Court's power."

We submit that the proper date for determining the valuation of the property in this case is April 9, 1948, the date upon which the stay was terminated, and that if the date of the termination of the stay is not the proper date in this case, then the date should be left to the determination of the trial court who will be in position to hear evidence and determine whether or not the property has depreciated since the termination of the stay by reason of the neglect

of the Farm-Debtor, and upon that evidence the Court will fix a date for determining the valuation of the property that will do equity to both parties.

Respectfully submitted,
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HERMAN HOWE,
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No. 12225

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

VS.

YUNG POY, also known as PAUL YOUNG,
Appellee.

Transcript of Record

Appeal from the United States District Court
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Southern Division

FILED
MAY 2 1938

PAUL R. BROWN,
Clerk

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

United States of America

No. 88041

PETITION FOR NATURALIZATION

[Of a Married Person, under Sec. 311, of the Nationality Act of 1940 (54 Stat. 1144-1145)]

To the Honorable the District Court of the United States at San Francisco, Calif. This petition for naturalization, hereby made and filed pursuant to Section 310(a) or (b), or Section 311 or 312, of the Nationality Act of 1940, respectfully shows:

1. My full, true, and correct name is Yung Poy, also known as Paul Young.

2. My present place of residence is 41 Wayne Place, San Francisco, Calif.

3. My occupation is Restaurant Proprietor.

4. I am 30 years old.

5. I was born on March 24, 1917, in Lung Hohn, China.

6. My personal description is as follows: Sex, male; color, yellow; complexion, sallow; color of eyes, brown; color of hair, black; height 5 feet, 8 inches; weight 135 pounds; visible distinctive marks, none; race, Chinese; present nationality, Chinese.

7. I am married; the name of my wife is Jennie Jung; we were married on February 1, 1942, at Reno, Nevada; she was born at Alviso, Santa Clara County, on December 24, 1919, and now resides with me. (Pet. amended Jan. 24, 1949, to show height of Petnr. as 5 ft., 8 in.

* * * *

8. I have two children; and the name, sex, date

and place of birth, and present place of residence of each of said children who is living, are as follows: Ann Elizabeth Young, female, San Francisco, Calif., June 30, 1942; Jean Elizabeth Young, female, June 21, 1945, San Francisco, Calif. Both reside with me.

9. My last place of foreign residence was Lung Hohn, Jung Shung, Kwangtung, China.

10. I emigrated to the United States from Hong Kong, China.

11. My lawful entry for permanent residence in the United States was at San Francisco, Calif., under the name of Yung Poy on July 3, 1926, on the S.S. "Pres. Taft" as shown by the certificate of my arrival attached to this petition.

12. Since my lawful entry for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer, as follows:

* * * *

18. I have resided continuously in the United States of America for the term of 2 years at least immediately preceding the date of this petition, to wit; since July 3, 1926.

19. I have not heretofore made petition for naturalization.

* * * *

21. Wherefore, I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America, and that my name be changed to Paul Young.

22. I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, that the same are true to the best

of my own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters I believe them to be true, and that this petition is signed by me with my full, true name; So Help Me God.

YUNG POY,

PAUL YOUNG.

Petitioner.

AR-3264578. [2]

Affidavit of Witnesses

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

My name is Jennie Young, my occupation is housewife. I reside at 41 Wayne Place, San Francisco, Calif.

My name is Constance Carew, my occupation is housewife. I reside at 136 Jordan Ave., San Francisco, Calif.

I am a citizen of the United States of America; I have personally known and have been acquainted in the United States with Yung Poy, the petitioner named in the petition for naturalization of which this affidavit is a part, since February 1, 1946, to my personal knowledge the petitioner has resided, immediately preceding the date of filing this petition, in the United States continuously since the date last mentioned, and I have personal knowledge that the petitioner is now and during all such period has been a person of good moral character, attached to the

principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

I do swear (affirm) that the statements of fact I have made in this affidavit of this petition for naturalization subscribed by me are true to the best of my knowledge and belief; So Help Me God.

JENNIE YOUNG,
Witness.

CONSTANCE CAREW,
Witness.

Subscribed and sworn to before me by the above-named petitioner and witnesses, in the respective forms of oath shown in said petition and affidavit, in the office of the Clerk of said Court at San Francisco, Calif., this 17th day of February, Anno Domini 1948. I hereby certify that Certificate of Arrival No. 1300-K-15067 from the Immigration and Naturalization Service, showing the lawful entry for permanent residence of the petitioner above-named, has been by me filed with, attached to, and made a part of this petition on this date.

(Seal)

C. W. CALBREATH,
Clerk.

By T. L. BALDWIN,
Deputy Clerk.

OATH OF ALLEGIANCE

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion; So Help Me God. In acknowledgment whereof I have hereunto affixed my signature.

YUNG POY,
PAUL YOUNG,
Petitioner.

Sworn to in open court, this 24th day of Jan., A.D. 1949.

C. W. CALBREATH,
Clerk.

By T. L. BALDWIN,
Deputy Clerk.

* * * *

Petition granted: Line No. of List No. 2217 and Certificate No. 6933500 issued.

Name changed to Paul Young.

* * * *

Petition continued from List 2204 11-22-48 submitted Statement of Facts filed Nov. 22, '48, for U. S. Petnr. brief filed Dec. 31, 1948.

Jan. 14, 1949, filed order that petnr. be adm. upon taking the oath.

Mar. 21, '49, filed notice of appeal and affid. of service.

Mar. 24, '49, filed designation of contents of record on appeal.

Mar. 24, '49, filed stipulation for transmittal of original documents.

Mar. 24, '49, filed order for transmittal of original documents.

Apr. 7, 1949, filed Reporter's Transcript. [2-a]

United States Department of Justice
Immigration and Naturalization Service

No. 1300-K-15067

CERTIFICATE OF ARRIVAL

I Hereby Certify that the immigration records show that the alien named below arrived at the port, on the date, and in the manner shown, and was lawfully admitted to the United States of America as the minor son of a merchant under Section 3(6) of the Immigration Act of 1924.

Name: Yung Poy.

Port of entry: San Francisco, Calif.

Date: July 3, 1926.

Manner of arrival: SS President Taft.

I Further Certify that this certificate of arrival is issued under authority of, and in conformity with, the provisions of the Nationality Act of 1940 (54

Stat. 1137), solely for the use of the alien herein named and only for naturalization purposes.

In Witness Whereof, this Certificate of Arrival is issued October 28, 1947.

WATSON B. MILLER,
Commissioner.

(Filed Feb. 17, 1948.)

Form N-220. [3]

Form N-484.

U. S. Department of Justice
Immigration and Naturalization Service

Date: November 22nd, 1948. List No. 2204.

This list consists of Four sheets. Sheet No. 1.

NATURALIZATION PETITIONS
RECOMMENDED TO BE DENIED

To the Honorable the District Court of the United States, sitting at San Francisco, California. C. A. Antonioli, F. P. Boland, J. F. O'Shea, duly designated under the Nationality Act of 1940 (54 Stat. 1156) to conduct preliminary hearings upon petitions for naturalization to the above-named Court and to make findings and recommendations thereon, has personally examined under oath at a preliminary hearing the following Twenty-one (21) petitioners for naturalization and their required witnesses, has found for the reasons stated below, that such peti-

tions should not be granted, and therefore recommends that petitions be denied.

* * * *

Petition No.: 88041.

Name of Petitioner: Yung Poy.

Reason for Denial: (1) There was not filed with petition a valid certificate showing the date, place, and manner of petitioner's arrival in the United States, and petitioner has not established exemption from such requirement; and (2) the petitioner has failed to establish continuous legal residence in the United States for the period required by law.

* * * *

Respectfully submitted,

F. P. BOLAND,

(Signature of officer in attendance at final hearing.)

Date November 22, 1948.

[Endorsed]: Filed Nov. 22, 1948. C. W. Calbreath,
Clerk. [4]

88041

YUNG POY (PAUL YOUNG)

QUESTION PRESENTED

Was the petitioner lawfully admitted to the United States for permanent residence within the meaning of the Nationality Act of 1940 as amended?

STATEMENT OF FACTS

The father of petitioner was lawfully admitted to the United States on February 6, 1917, as a merchant under Article II of the Treaty of 1880 with

China and the proclamations and statutes enacted to carry it into effect.

The petitioner, who is of Chinese race and nationality, was born in China on March 24, 1917, and on July 3, 1926, was admitted to the United States at San Francisco, California, as the son of a merchant. Thereafter the father ceased to be a merchant and on September 9, 1932, the petitioner was ordered deported to China on the ground that he had remained in the United States after failing to maintain the exempt status, under which he was admitted, of an alien entitled to enter the United States solely to carry on trade under and in pursuance to the provisions of the present existing treaty of commerce and labor. A writ of habeas corpus was obtained in the District Court at San Francisco and upon the hearing thereof, it was ordered that the petitioner be discharged from custody. An appeal was taken to the Circuit Court of Appeals, Ninth Circuit, and the order was affirmed. (*Haff v. Yung Poy*, 68 F 2d 203.)

On February 1, 1942, the petitioner married a native-born citizen of the United States and on February 17, 1948, filed the present petition for naturalization without a declaration of intention as the spouse of a citizen under the provisions of Section 311 of the Nationality Act of 1940.

Filed with the petition is a certificate of arrival qualified to show the petitioner's admission to the United States as the minor son of a merchant under Section 3(6) of the Immigration Act of 1924. [5]

AUTHORITIES AND ARGUMENT

The Nationality Act of 1940 requires a lawful entry for permanent residence as a prerequisite to admission to citizenship except in specifically stated cases.

Section 311 of the Nationality Act (8 U.S.C. 711), under which the instant petition was filed, reads as follows:

“A person who upon the effective date of this section is married to or thereafter marries a citizen of the United States, or whose spouse is naturalized after the effective date of this section, if such person shall have resided in the United States in marital union with the United States citizen spouse for at least one year immediately preceding the filing of the petition for naturalization, may be naturalized after the effective date of this section upon compliance with all requirements of the naturalization laws with the following exceptions:

(a) No declaration of intention shall be required.

(b) The petitioner shall have resided continuously in the United States for at least two years immediately preceding the filing of the petition in lieu of the five-year period of residence within the United States and the six months' period of residence within the State where the naturalization court is held. (8 U.S.C. 711).”

Section 329(b) of the Nationality Act of 1940 (8 U.S.C. 729) requires a lawful entry for permanent residence in connection with the filing of a declaration of intention. This section reads as follows:

“No declaration of intention shall be made by any person who arrived in the United States after June

29, 1906, until such person's lawful entry for permanent residence shall have been established, and a certificate showing the date, place, and manner of arrival in the United States shall have been issued. It shall be the duty of the Commissioner or a Deputy Commissioner to cause to be issued such certificate. (8 U.S.C. 729(b)).”

Section 332(a) (Allegation 11) of the Nationality Act (8 U.S.C. 732) requires a recital of lawful admission for permanent residence in connection with the filing of a petition for naturalization, as follows:

“An applicant for naturalization shall, not less than two nor more than ten years after such declaration of intention has been made, make and file in the office of the clerk of a naturalization court, in duplicate, a sworn petition in writing, signed by the applicant in the applicant's own handwriting, if physically able to write, and duly verified by witnesses, which petition shall contain substantially the following averments by such applicant:

(11) My lawful entry for permanent residence in the United States was at (city or town), (state), under the name of, on (month, day, and year), on the (name [6] of vessel or other means of conveyance), as shown by the certificate of my arrival attached to this petition. (8 U.S.C. 732(a)).”

Subdivision (c) of Section 332 requires that a certificate be filed with the petition, stating the facts of arrival.

Part 322 (Sec. 322) Title 8, Code of Federal Regulations (Cumulative Supplement) promulgated by the Commissioner of Immigration and Naturaliza-

tion with the approval of the Attorney General, under authority contained in Section 327 of the Nationality Act (8 U.S.C. 727), reiterates the requirement for lawful admission for permanent residence:

“A person, not a citizen of the United States in order to be eligible for naturalization upon a petition for naturalization to a naturalization court, shall, unless specially exempted as set forth in sub-chapter D (Nationality Regulations) of this title—

(b) Have been lawfully admitted to the United States for permanent residence.”

It is settled that lawful entry for permanent residence cannot result from mere sojourn in the United States, no matter how protracted. (*Kaplan v. Tod*, 267 U.S. 228, 45 S.Ct. 257, 69 L.Ed. 585; *Zartavian v. Billings*, 204 U.S. 170, 27 S.Ct. 182, 51 L.Ed. 428; *U.S. v. Parisi*, 24 F. Supp. 414). Although “residence” or “domicile” may legally be established for many purposes, such as for divorce, charity, etc., by an alien admitted under the legal status of a temporary visitor, it is not sufficient for naturalization. (*In re Weig*, 30 F (2d) 418; *U.S. v. Beda*, 118 F (2d) 458; also as seamen, *U.S. v. Kreticos*, 40 F (2d) 1020; *Fanfariotis v. U.S.*, 63 F (2d) 352; *In re Jensen*, 11 F (2d) 414; *In re Olson*, 18 F (2d) 425). It is equally well settled that an alien cannot meet the legal residence requirement, even if he is found to be not deportable. (*Sadi v. U.S.*, 48 F (2d) 1040; *Stapf v. Corsi*, 287 U.S. 129, 53 S.Ct. 40, 77 L.Ed. 215.)

It follows that if the petitioner's entry is found to have been a qualified one, he cannot meet the terms of the Nationality Act. [7]

An entry after the effective date of the Immigra-

tion Act of 1924 by the minor son of a Chinese merchant, admitted prior to that act, does not constitute a lawful admission for permanent residence within the meaning of the Nationality Act.

Article II of the treaty between the United States and China concerning immigration of Chinese reads as follows:

“Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.” (22 Stat. L. 826; concluded Nov. 17, 1880; ratification advised by the Senate May 5, 1881; ratified by the President May 9, 1881; ratifications exchanged July 19, 1881; proclaimed Oct. 5, 1881.)

The convention regulating Chinese immigration was concluded March 17, 1894, by which immigration of Chinese laborers was prohibited for ten years. By Article IV of that convention it was provided:

“In pursuant of Article III of the Immigration Treaty between the United States and China, signed at Peking on the 17th day of November, 1880, * * * it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, except-

ing the right to become naturalized citizens. * * *.”

By an amendment to “an act to execute certain treaty stipulations relating to Chinese,” Congress, on November 3, 1893, defined the term “merchant” as follows:

“Sec. 2. * * * the term ‘merchant’, as employed herein and in the acts of this is amendatory, shall have the following meaning and none other:

‘A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.’ ” (28 Stat. L. 7.)

In the Act of November 3, 1893, Congress also defined “Domiciled merchant” as follows:

“Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two creditable witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the [8] United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landings.” (28 Stat. L. 7.)

The Immigration Act of May 26, 1924, “to limit the immigration of aliens into the United States,” defines its scope:

“Sec. 25. The provisions of this Act are in addi-

tion to and not in substitution for the provisions of the Immigration Laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the Immigration Laws other than this Act, and an alien, although admissible under the provisions of the Immigration Laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act.” (8 U.S.C. 223.)

The 1924 Immigration Act classifies all aliens entering the United States for permanent residence as “immigrants” and “non-quota-immigrants”, excepting from such definition those entering temporarily or during a period requiring the maintenance of status. This latter group is commonly referred to as “non-immigrants”. The Statute is in the following language:

“Sec. 3. When used in this Act the term ‘immigrant’ means any alien departing from any place outside the United States destined for the United States, except, (1) an accredited official of a foreign government, * * * and (6) an alien entitled to enter the United States solely to carry on trade between the United States and a foreign state of which he is a National under and in pursuance of the provisions of a treaty of commerce and navigation, and his wife, and his unmarried children under 21 years of age, if accompanying or following to join him * * *.” (8 U.S.C. 203, as amended by the Act of July 6, 1932.)

Prior to the amendment of July 6, 1932, the sixth subdivision of section 3 read as follows:

“(6) An alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.”

“Immigrant” as above defined and “non-quota-immigrant” as defined in Section 4 of the Act of 1924 constitute the classes of aliens whose admission to the United States is authorized for lawful permanent residence under the 1924 Immigration Act. (8 U.S.C. 204.) Student “non-quota-immigrants” are taken out of the class of alien admitted for permanent residence by Section 15 of the Act (8 U.S.C. 215; 8 C.F.R. 125.5.) [9]

Section 13(c) of the Immigration Act of 1924 excluded as immigrants aliens ineligible to citizenship:

“No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant under the provisions of subdivision (b), (d), or (e) of Section 4, or (2) is the wife, of the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in Section 3. * * *”

Section 15 of the Immigration Act of 1924 requires maintenance of the exempt status of aliens admitted to the United States who are excepted from the status of immigrants and quota immigrants:

“The admission to the United States of an alien excepted from the class of immigrants by clause 1, 2, 3, 4, 5, or 6 of Section 3 * * * shall be for such

time, and under such conditions as may be by regulations prescribed * * * to insure, that at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States * * *.” (8 U.S.C. 215.)

The terms “status” and “trader’s status” as used in the Immigration Act of 1924 are defined in regulations promulgated by the Commissioner of Immigration and Naturalization with the approval of the Attorney General in 8 C.F.R. 110.27, authorized by Section 24 of the Immigration Act (8 U.S.C. 224). Section 110.29(a), (b) and (c) of Title 8 C.F.R. requires the maintenance of status by certain-non-immigrants, including an alien who has been admitted as the unmarried minor child of a treaty trader.

Rule 18, paragraph 5, of the Chinese Rules of October 1, 1926, promulgated by the Commissioner of Immigration, with the approval of the then Secretary of Labor, under authority contained in Section 24 of the Immigration Act of 1924, provided as follows:

“Par. 5. Aliens who have been admitted as non-immigrants * * * under Section 3 * * * of the Immigration Act of 1924 * * *, and aliens admitted under Section 3(6) of said Act as non-immigrants (together with their alien wives and minor children admitted at the time or subsequently) who shall fail or refuse to maintain the status under which admitted, or to depart voluntarily when they have ceased to maintain such status; shall be taken into custody upon warrant of the Secretary of Labor and deported in the manner provided by Section 14 of the Immigration Act of May 26, 1924.” [10]

Provision is made in Section 14 of the Act (8 U.S.C. 214) for the deportation of any alien who is found to have remained longer than permitted under the Act or regulations made thereunder.

At the time of his entry, the petitioner was of a race ineligible to citizenship and therefore was excludable if applying for admission as an immigrant. An examination of the facts indicates that the only section applicable to him was Section 3(6) and entry under this section was an entry for a limited purpose. It was contended at one time that this Act excluded the wives and children of treaty merchants where the merchant had entered prior to the Act of 1924 and the family sought admission subsequently, but the Supreme Court in *Cheung Sum Shee v. Nagle*, 268 U.S. 336, 45 S.Ct. 539, 69 L.Ed. 985, ruled otherwise. However, the Court clearly indicated that persons falling within petitioner's class came within the terms of the Act, stating: "An alien entitled to enter the United States 'solely to carry on trade' under an existing treaty of commerce and navigation is not an immigrant within the meaning of the Act, Section 3(6), and therefore is not absolutely excluded by Section 13. Further, "In a very definite sense they are specified by the Act itself as non-immigrants."

An entry under Section 3(6) of the Act of 1924 is definitely not an entry for permanent residence. It was held in the case of *Yim v. U.S.*, (C.C.A. 8 1935), 78 F (2d) 43, that treaty merchants admitted to the United States after June 30, 1924, are not classed as permanent residents and may be deported for failing to maintain status. Similarly, it was held that the family of a merchant could be deported if admitted

on the basis of its relationship and the merchant status had terminated. *Koga v. Berkshire*, (C.C.A. 9-1935), 75 F (2d) 820. It can be seen, therefore, that an entry under this section is limited in its purpose and hence could not be made the basis for a petition for naturalization.

It is true that the language used by the Court in ruling on the appeal in the habeas corpus case involving petitioner is very broad but it [11] should be born in mind that the sole issue before the Court was whether or not petitioner was deportable because the father had failed to maintain status. It was conceded that the father, entering at the time he did, was not required to maintain his status and the Court held that the rights of the son were co-extensive with the father insofar as deportation was concerned. This is a far different ruling than a holding that petitioner's entry was a lawful entry for permanent residence within the meaning of the Nationality Act. Further, since the ruling of the Court in that case, Congress has enacted the following legislation:

“Be it enacted by the Senate and House and Representatives of the United States of America in Congress assembled, That section 10 of the Act of May 26, 1924, (43 Stat. 158; U.S.C., title 8, sec. 210(a)-210(f)), is amended by adding a new subsection thereto to be known as subsection (g) and to read as follows:

““(g) An alien lawfully admitted to the United States, pursuant to clause 6, section 3, of this Act, between July 1, 1924, and July 5, 1932, both dates inclusive, who since entry has maintained the status required of him at the time of his admission and who desires to visit abroad and return to the United

States to resume the status existing at time of his departure for such visit, may apply to the Commissioner of Immigration and Naturalization for a Treaty-Merchants Return Permit which may be issued by the Commissioner, with the approval of the Attorney General, if he finds that the applicant is entitled thereto. Such a permit shall, in the possession of persons to whom issued, be accepted in lieu of any visa otherwise required from non-immigrants under this Act or section 30 of the Alien Registration Act of 1940 (54 Stat. 673; 8 U.S.C. 451). Each permit shall be valid for a period therein designated not exceeding one year, but may be extended for good cause shown to the satisfaction of the Commissioner of Immigration and Naturalization, for a period or periods not exceeding six months each. For the issuance of any such permit or any extension thereof there shall be paid to the Commissioner of Immigration and Naturalization a fee of \$3, which shall be covered into the Treasury as miscellaneous receipts. The necessary forms and other requirements to effect the purposes of this subsection shall be prescribed by regulations of the Commissioner of Immigration and Naturalization, with the approval of the Attorney General. Subsection (e) shall be applicable to this subsection.' '' Signed by President on June 3, 1948.

It will be noted that this section does not make any distinction between persons whose parents entered prior to the act or subsequent thereto. It provides simply for the issuance of a return permit to those persons who entered under section 3(6) after 1924. It would seem that if there were a [12] sepa-

rate class of persons whose parents entered prior to the Act, the section would have provided for them. The language of the Act of 1924 as interpreted by the Courts is broad enough to cover the facts in this case and there appears to be no reason for going outside it to set up a separate and distinct class which would have privileges not accorded to others.

The repeal of the Chinese Exclusion Acts did not contemplate that all Chinese in this country under a mercantile status would become eligible for naturalization.

In repealing the Chinese Exclusion Acts and making the Chinese racially eligible for naturalization, the Congressional Committees contemplated that such legislation would place those few Chinese that were to be permitted entry on a parity with other racial groups, but not that the legislation would, in any way, change the existing immigration status of Chinese aliens in this country so as to enable greater numbers to meet the requirements for naturalization. In fact, the language of the Senate Committee clearly demonstrates the Committee understood that the greater number of Chinese in this country are ineligible to naturalize because they have not been admitted for lawful permanent residence, which is a condition precedent to naturalization. Their understanding is expressed in the following language:

“The number of Chinese who will actually be made eligible for naturalization under this Section is negligible. There are approximately 42,000 alien Chinese persons in the United States (37,242 in continental United States and 4,844 in Hawaii, according to the census figures of 1940). However, a large number of

these Chinese have never been admitted to the United States for lawful permanent residence, which is a condition precedent to naturalization and, therefore, many of this number would not be eligible for naturalization, not because of racial disability, but because they cannot meet existing statutory requirements of law. The number of Chinese who will be made eligible in the future, in addition to those already here, will of necessity be very small because the quota for China is limited to 105 per annum, as provided in section 2 of this bill." (Chinese Exclusion Repeal Act of Dec. 17, 1943 (57 Stat. 600; Sec. 303)).

The last sentence of the above-quoted paragraph clearly shows that "lawful permanent residence which is a condition precedent to naturalization" [13] means admission to the United States as an "immigrant". Section 2 of the Act of December 17, 1943, provides that with the exception of certain nonquota immigrants under the 1924 Act, all Chinese persons entering the United States annually as immigrants shall be allocated to the quota for Chinese computed under the provisions of Section II of said Act; and that preference up to 75 per centum of the quota shall be given to Chinese born and resident in China. The remaining 25 per centum would be available for Chinese in other countries or temporarily in the United States who are in a position to apply for pre-examination or other benefits of the immigration laws incident to admission for lawful permanent residence in the United States as immigrants. As only 25 per cent of the quota of 105 is available to

Chinese who come from countries other than China or who are already in the United States, it follows that only very few of those already here can be naturalized and as all who proceed toward naturalization must have a lawful entry for permanent residence, "the number who will actually be made eligible for naturalization under this section is negligible".

In addition to Chinese admissible under the quota of 105 per annum, the following Chinese persons are regarded as lawfully admitted for permanent residence for all purposes, including naturalization, if regularly admitted and belonging to one of the following classes:

1. Aliens readmitted between July 1, 1924, and December 16, 1943, inclusive, as returning Chinese laborers who acquired lawful permanent residence prior to July 1, 1924.

2. Persons admitted between July 1, 1924, and June 6, 1927, inclusive, as United States citizens under Section 1993 of the United States Revised Statutes, such admission having been in error for the reason that their fathers had not resided in the United States prior to their birth.

3. Nonquota immigrants admitted at any time after June 30, 1924, as lawfully admitted aliens returning from a temporary visit abroad, or as ministers or professors, and their families.

4. Nonquota immigrant wives admitted between June 13, 1930, and December 16, 1943, inclusive. [14]

5. Nonquota immigrants admitted on or after

December 17, 1943, who were formerly citizens of the United States and lost citizenship by marriage.

Since these latter classes are eligible for naturalization in addition to the 105 admissible per annum under the quota, the legislators would hardly refer to the "number who will be made eligible for naturalization" as "negligible" if they meant to include in addition to these groups all Chinese treaty merchants and their families. Comparatively few of the latter class would be naturalized since they would necessarily be allocated to the 25 per centum of the quota under which they could obtain lawful admission for permanent residence.

From a careful study of the legislative history of the Act of December 17, 1943, it will be noted that in repealing the Chinese exclusion laws it was not the purpose of the legislators to open wide the doors to Chinese immigrants. The following is quoted from page 3 of Senate Report No. 535 with regard to Section 1:

"The purpose of this section is to repeal all of the laws enacted between 1882 and 1913, dealing with the exclusion and deportation of Chinese persons. It should be stated at this point that no substantial gain accrues to the Chinese people through the repeal of these laws from a standpoint of permitting Chinese to enter the country who are at present denied that privilege because other provisions of laws subsequently enacted effectively keep out persons of the Chinese race as well as persons of other races ineligible to citizenship. It does, however, eliminate the undesirable laws specifically designating Chinese as

a race to be excluded from admission to the United States.”

President Roosevelt, in his message to Congress (p. 3, Sen. Rep. 535), on October 11, 1943, regarding the 1943 Act, states: “By the repeal of the Chinese exclusion laws, we can correct a historic mistake and silence the distorted Japanese propaganda. The enactment of legislation now pending before the Congress would put Chinese immigrants on a parity with those from other countries. The Chinese quota, would, therefore, be only about 100 immigrants a year. There can be no reasonable apprehension that any such number of immigrants will cause unemployment or provide competition [15] in the search for jobs. The extension of the privileges of citizenship to the relatively few Chinese residents in our country would operate as another meaningful display of friendship.” (P. 3 Senate Rep. 535.)

Senate Report No. 535 states explicitly that admission for lawful permanent residence in accordance with existing statutory requirements is a condition precedent to naturalization. “Admission for lawful permanent residence” as used in the Immigration and Naturalization statutes means admission in compliance with the immigration laws as an immigrant to reside here permanently and without restriction upon such residence. By making the Chinese eligible for admission into the United States under a quota and for citizenship, it certainly was not intended that all treaty merchants would have the privileges granted to aliens generally.

Conclusion

The entry of the petitioner was made after the enactment of the Immigration Act of 1924 and therefore such entry was necessarily limited by that act. The Nationality Act of 1940 requires a lawful admission for permanent residence. This the petitioner does not have. Since his residence is a qualified one, he is not eligible for naturalization.

/s/ F. P. BOLAND,

Designated Naturalization Examiner.

[Endorsed]: Filed Nov. 22, 1948. C. W. Calbreath,
Clerk. [16]

In the Southern Division of the United States
District Court for the Northern District
of California

Petition No. 245-P-88041

In the Matter of the Petition of YUNG POY, also
known as PAUL YOUNG, for Naturalization.

PETITIONER'S BRIEF

Question Presented

Was the petitioner lawfully admitted to the United States for permanent residence at the time of his entry on June 2nd, 1926, at San Francisco, California.

Statement of Facts

Yung Poy, the petitioner' who is of Chinese race and nationality, was born in China on March 24, 1917; he was lawfully admitted to the United States as a minor son of a resident Chinese merchant, on

June 2nd, 1926, (under Provision of Article 2, Treaty of November 17th, 1880, between the United States and China), at San Francisco, California.

Yung Poy's father was lawfully admitted to the United States on February 6th, 1917, as a merchant, under Article II of the Treaty of 1880 with China. At the time of petitioner's admission into the United States, his father was lawfully domiciled here, and engaged as a merchant at San Jose, California. In 1927, the father ceased to be a merchant, and obtained employment [17] as a janitor, the mercantile institution with which the father had been associated, went out of business.

The petitioner is married to a native-born citizen of the United States, and has filed his petition for citizenship under Section 311 of the Nationality Act of 1940, which provides that the petitioner prove two years of permanent residence in the United States prior to the filing of his petition.

Argument

Much, if not all of the questions presented for decision by this Court have been previously decided in the case of *Haff vs. Yung Poy*, 68 F (2d) 203, C.C.A. 9th Cir. 1933). The petitioner for naturalization in this case, is identical with and is the same Yung Poy who was the appellee in the case above-referred to.

Deportation proceedings were instituted against the minor son, on the grounds that one admitted to the United States under the Immigration Act of 1924, as a minor son of a trader, became subject to deportation if the father ceased to carry on trade.

The Court, after reviewing the decisions, including *Cheung Sum Shee v. Nagle*, (268 U.S. 336, 45 S.Ct. 539), and *U.S. v. Mrs. Gue Lim*, (176 U.S. 459, 20 S.Ct. 415), states on page 204,

“In view of these decisions, we are of the opinion that appellees’ rights to remain in the United States is measured by the Treaty and not by the Immigration Act of 1924, even though he came here after the passage of that Act.”

Then the Court considers the question as to whether the change in the father’s status require that the son be deported: The Court held that the minor son’s right to remain in the United States was governed by the Treaty of 1880, and not by the Act of 1924, and that no limitation or restriction upon the alien’s stay in the United States is contained in the treaty. At pages 204-205 the Court further states: [18]

“—In support of its claimed right to deport appellee because he has lost his communicated status as the son of a merchant, the Government relies upon Section 15 of the Act of 1924 (8 U.S.C.A.-215), and the departmental rules promulgated thereon. Said Section 15 provides, in part, that, upon failure to maintain the status under which admitted, the alien will depart. But, as we have seen, appellee’s right to remain in the United States is governed by the treaty and not by the act, and no limitation or restriction upon the alien’s stay in the United States is contained in the treaty. On the contrary, it is well settled that a Chinese merchant, lawfully admitted prior to the act of 1924, may remain here after he has lost his status as a merchant (see *Lo Hop v. U.S.*, (C.C.A. 6), 257 F. 489, and *Wong Sun Fay v. U.S.*, (C.C.A.

9), 13 F. (2d) 67); and the government therefore concedes that appellee's father is not now deportable. The right of such a merchant's wife or minor child to remain here after loss of his or her communicated status, by reason of the merchant's changed occupation, is, of course, another question; but that such an alien's right is coextensive with the right of the husband, or father, seems a just and reasonable answer, for the absurdities and hardships of a contrary rule of law are apparent. Thus, if a merchant, because of illness, mishap, economic condition, or other misfortune, were required to change his status as a merchant and secure other employment, should his hapless—and perhaps helpless—family be deported and he allowed to remain, or perforce required to remain because of long absence from his native country and environment? Likewise, must the family of such a merchant be deported because, upon the death of the merchant, the communicated status of the wife and children has been lost?

“With these harsh consequences in mind, and in view of the well-settled rule of law ‘that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion’ (Lau Ow Bew v. United States, 144 U.S. 47, 59, 12 S.Ct. 517, 520, 36 L.Ed. 340) we cannot conclude that the rights of such aliens to remain here should be construed so narrowly as the government contends, or that it was the intention of Congress in enacting the Immigration Act of 1924 that aliens admitted to the United States by virtue of the ‘merchant status’ of their prior domiciled father or husband, as the

case might be, should be deported because the merchant, although not subject to deportation, has lost his status as a merchant."

In line with the Court's reasoning, as [19] above set forth, that the appellees' rights are coextensive with the right of his father, his entry should certainly be considered one for permanent residence under the Nationality Act of 1940 as Amended. It would be conceded by the Government that the father's entry prior to 1924 as a Chinese merchant would be considered a lawful admission for permanent residence. A Certificate of Arrival would therefore issue.

In effect, the Government in its Brief has contended that the petition should be denied because petitioner did not enter the United States for permanent residence, and consequently the Certificate of Arrival that is attached to the Petition is not valid. If, however, the petitioner lawfully entered the United States for permanent residence, as has been previously decided, then the Certificate of Arrival attached to his Petition is valid and sufficient, and his residence since his arrival in the United States is a legal one.

It is interesting to analyze the Government's Brief in support of its position. On page 3 it recites many cases, but not one of the cases cited is a Chinese case, and all can be distinguished on their facts from the case under discussion; they are mainly concerned with cases where people are illegally here to start with, or cases where parties entered as visitors and overstayed their leave, or cases where in passports or visas were obtained in another party's name and

consequently constituted illegal entry, perpetrated through fraud. It is significant to note however, that no case is cited wherein the person involved is of the Chinese race, nor where the Treaty with China, November 17th, 1880, is brought into question.

In the case of Wong Choon Hoi, 246-P-126123, decided by United States District Judge Wm. C. Mathes, the facts were similar to the facts contained in this case. The Court held:

“I am unable to perceive any sound basis for the [20] Commissioner’s opposition. Precedent of long standing holds that where, as in the proceeding at bar, a Chinese merchant was admitted to this country prior to 1924 pursuant to the Treaty of 1880, members of his family (wife and unmarried minor children) coming after 1924 are entitled to be admitted for permanent residence by virtue of the Treaty. (*Cheung Sum Shee v. Nagle*, 268 U.S. 336 (1925); *Haff v. Yung Poy*, 68 F. (2d) 203 (C.C.A. 9th, 1933.)

These decisions are to be respected as determining the character of residence for which petitioner was admitted. The fact that Chinese persons were ineligible for naturalization until the 1943 amendment cannot affect the character of that residence. (*Petition of Chi Yan Cham Louie*, No. 39,067, W.D. Wash., unreported decision of Judge Black, August 29, 1946.)

Long before the Nationality Act of 1940, Chinese merchants admitted to engage in business here pursuant to the Treaty of 1880 were referred to as “domiciled” in this country. (*Cheung Sum Shee v. Nagle*, *supra*, 268 U.S. at p. 334; *United States v. Mrs. Gue Lim*, 176 U.S. 459 (1900); *Lau Ow Bew v. United*

States, 144 U.S. 47 (1892); *Wong Yow v. Weedin*, 33 F. (2d) 377 (C.C.A. 9th, 1929); *Woo Hoo v. White*, 243 Fed. 541 (C.C.A. 9th, 1917.)

The term "residence", as used in the naturalization statutes, is practically synonymous with "domicile". (*Petition of Wright*, 42 F. Supp. 306, 307 (E. D. Mich., 1941); *United States v. Parisi*, 24 F. Supp. 414, 419 (D.C. Md. 1938); *Petition of Oganessoff*, 20 F. (2d) 978, 980 (S.D. Cal. 1927); *United States v. Shanahan*, 232 Fed. 169, 172 (E.D. Pa. 1916).

Being a minor when he entered this country, petitioner acquired at that time the domicile of his father. There has been no suggestion of any act or expression of intent indicating change of domicile either before or after petitioner became emancipated upon attaining majority.

Indeed, all the facts in evidence are to the contrary. Petitioner has been present and engaged in business in this country for twelve years and more since his admission for permanent residence. During the past five years he has been married to a citizen of the United States by birth, and is now the father of three children born in this country.

Accordingly it must be held that petitioner has more than met the three-year residence requirement of Sec. 310(b) of the Nationality Act of 1940. The petition of Wong Choon Hoi is granted." [21]

The above case reported in D.C. Cal., 1947-71-F. Supp. 160. Decision rendered in case on February 17, 1947.

The Government in its Brief, on page 8, states that the Congress has enacted legislation, which provides in effect that under certain conditions Treaty-

Merchants Return Permits may be issued. What particular relative pertinency this bears to the case under discussion, escapes counsel. The Government itself admits that the petitioner cannot be deported.

It was conceded that the father, entering at the time he did, was not required to maintain his status and the Court held that the rights of the son were co-extensive with the father insofar as deportation was concerned.

All the legislation referred to on page 8 stated that in the event the Treaty-Merchant wishes to leave the United States, he could secure a Permit to return to the United States. Inasmuch as it has been judicially determined that this petitioner does not have to maintain status, and is here permanently, and was admitted under the Treaty with China December 7th, 1880, this particular legislation does not apply to this case in any respect.

Government argues that the Congressional Committees who were considering repeal of the Chinese Exclusion Acts, understood that the greater number of Chinese in this country are ineligible for naturalization because they have not been admitted for lawful permanent residence; even conceding that this was the intent of the Committee, it would not apply to the instant case, inasmuch as petitioner was admitted for permanent residence and in addition to this it should be conceded that the real reason a great many Chinese in this country have not and will not apply for naturalization is, that they would not be able to satisfy the requirements of the law, that they be able to speak and understand English.

It is interesting to note that in Report No. 535, of

the Senate Committee of the 78th Congress, 1st Session, Calendar No. 543, that the Committee states that it had for its consideration, letters from Francis Biddle, Attorney General, and from the President of the United States Franklin D. Roosevelt. Nowhere in the letter to the Senate Committee, either from the Attorney General or from the President of the United States, is there any indication or any intent shown to limit the benefits of the repeal of the Exclusion Act to just a few of the Chinese residents in this country, but on the contrary the spirit and intent would be to extend the benefits as widely as possible among the 45,000 Chinese alien residents of this country.

Below is a copy of the letter submitted by the Attorney General in respects to a request by the Senate Committee considering the repeal of the Chinese Exclusion Act, and also a copy of the President's Message to Congress of the United States, which is contained in the Senate Committee Report:

“Hon. Richard B. Russell

“Chairman, Committee on Immigration

“United States Senate, Washington, D. C.

“My dear Senator:

“This acknowledges your letter of Oct. 1, 1943, requesting my views relative to a bill (S.1404) to repeal the Chinese Exclusion Laws, to establish quotas and to make Chinese residents of the United States eligible for naturalization. The measure would repeal all existing statutory provisions excluding persons of the Chinese race from entry into the

United States (Sec. 1). It would apply the immigration quota provisions to Chinese and would allocate all Chinese persons entering the United States as immigrants to the quota for China (Sec. 2). The existing naturalization laws, which are limited to white persons, persons of African nativity or descent, and descendants of races indigenous to the Western hemisphere would be extended so as to include Chinese persons and persons of Chinese descent (Sec. 3).

“The Chinese Exclusion Laws were enacted during a period when immigration to this country was not restricted by any quota provisions, the quota limitations having been first introduced into the laws by the Immigration Act of 1924. The quota restrictions are a sufficient protection to this [23] country against excessive immigration, generally, and against the possibility of an unreasonable number of immigrants from any one country. No useful purpose is being served by retaining the Chinese Exclusion Laws in effect, since under quota provisions the Chinese quota would be only 105 persons annually.

“The heroism of the Chinese people has won the respect and admiration of the United Nations. A repeal by the Congress of our antiquated exclusion laws can be an expression of our gratitude and a symbol of our esteem.

“Similarly we should extend to Chinese residents in this country the same eligibility for citizenship that is now given people of other nations. While only approximately 45,000 Chinese residents who are in the United States would benefit directly by such

action, the goodwill created would extend to the millions in China who are fighting at our side.

“Accordingly I recommend the enactment of the bill.

“Sincerely yours,

“FRANCIS BIDDLE,
“Attorney General.”

“PRESIDENT’S MESSAGE TO CONGRESS

“To The Congress of the United States:

“There is now pending before the Congress, legislation to permit the immigration of Chinese people into this country and to allow Chinese residents here to become American citizens. I regard this legislation as important in the cause of winning the war and of establishing a secure peace.

“China is our ally. For many long years she stood alone in the fight against aggression. Today we fight at her side. She has continued her gallant struggle against very great odds. China has understood that the strategy of victory in this World War first required the concentration of the greater part of our strength upon the European front. She has understood that the amount of supplies we could make available to her has been limited by difficulties of transportation. She knows that substantial aid will be forthcoming as soon as possible, and not only in the form of weapons and supplies, but also in carrying out plans already made for offensive effective action. We and our allies will aim our forces at the heart of Japan—in ever increasing strength, until the common enemy is driven from China’s soil.

“But China’s resistance does not depend alone on guns and planes and on attacks on land, on the sea, and from the air. It is based as much in the spirit of her people and her faith in the allies. We owe it to the Chinese to strengthen that faith. One step in this direction is to wipe from the Statute books those anachronisms in our law which forbid the immigration of the Chinese people into this country, and which bar Chinese residents from American citizenship.

“Nations, like individuals, make mistakes. We must be big enough to acknowledge our mistakes of the past and to correct them.

“By the repeal of the Chinese Exclusion Laws, we can correct a historic mistake and silence the distorted Japanese propaganda.

“The enactment of legislation now pending before the Congress would put Chinese immigrants on a parity with those from other countries. The Chinese quota would therefore be only [24] about 100 immigrants a year. There can be no reasonable apprehension that any such number of immigrants will cause unemployment or provide competition in the search for jobs.

“The extension of the privileges of citizenship to the relatively few Chinese residents in our country would operate as another meaningful display of friendship. It would be additional proof that we regard China not only as a partner in waging war, but that we shall regard her as a partner in days of peace. While it would give the Chinese a preferred

status over certain other oriental people, their great contribution to the cause of decency and freedom entitles them to such preference.

“I feel confident that the Congress is in full agreement with these measures—long overdue—should be taken to correct an injustice to our friends. Action by the Congress now will be an earnest of our purpose to apply the policy of the good neighbor to our relations with other peoples.

“The White House, October 11, 1943.

“FRANKLIN D. ROOSEVELT.”

The Congress and the President of the United States certainly intended to reopen privileges of naturalization to all those Chinese who could meet the requirements of the law.

Is there any practical alternative which would allow petitioner to eventually become a citizen of the United States if it were decided that his entry was not one for permanent residence under the Nationality Act of 1940 as amended?

The Monthly Review of the Immigration and Naturalization Service, issue of December, 1947, Vol. V, No. 6, Article “A Century of Chinese Immigration”, on page 73, in brief review recites as follows:

“Since Repeal of the Chinese Exclusion Laws * * * Removal of Chinese persons from the category ‘aliens ineligible to citizenship’ especially benefits those Chinese aliens already residing in the United States. Those lawfully here for permanent residence are eligible, in most cases, to proceed toward naturalization. Those unlawfully here are in a position to be

considered for the exercise of discretionary relief under Section 19(c) of the Act of February 5, 1917, or, if entry occurred before July 1, 1924, to apply for a certificate of lawful entry, and thus to change their status to that of persons admitted to the United States for permanent residence.”

However, the petitioner, because he was admitted lawfully to the United States, is not subject to deportation, and therefore is not eligible to apply for discretionary relief [25] under Section 19(c) of the Act of February 5, 1917, as amended, 39 Stat. 889-890, 54 Stat. 671-673, 56 Stat. 1044, nor for the same reason, i.e., his being in the United States legally, can he be considered for relief under the recently enacted Public Law 863, which provides that a person who is a resident of the United States for seven years, and who entered the United States illegally, or is now in the United States in an illegal status, is eligible for discretionary relief.

Petitioner is further precluded from applying for a record of registry, see Section 728(b) of Nationality Act of 1940, as amended, because his entry to the United States was subsequent to July, 1924.

Conclusion

There have been two cases involving similar facts, wherein minor children of Chinese merchants under the Treaty with China of November 17, 1880, were admitted to citizenship; they are the cases of Wong Choon Hoi, D.C. Cal., 1947, 71-F Sup. 160, and petition of Chi Yan Cham Louie, No. 39067 (W.D. Wash., unreported decision of Judge Black, August 29, 1946).

In addition the case of *Haff v. Yung Poy*, involving this petitioner, wherein it has been decided that he was admitted to the United States for permanent residence.

It is submitted that the petitioner legally entered the United States for permanent residence, as a minor son of a Chinese merchant, pursuant to the Treaty of November 7, 1880, between the United States and China; that he has maintained legal and continuous residence in the United States since June 2nd, 1926; has a native-born spouse and two minor children, both born in the United States; has complied with all of the statutory requirements relating to naturalization, and is therefore eligible for naturalization on his present petition.

Respectfully submitted,

/s/ NORMAN STILLER,
Attorney for Petitioner.

[Endorsed]: Filed Dec. 31, 1948. [26]

In the United States District Court for the
Northern District of California,
Southern Division

In the Matter of the Petition of YUNG POY, also
known as PAUL YOUNG, For Naturalization.

No. 245-P-88041

ORDER ADMITTING PETITIONER
TO CITIZENSHIP

Upon the authority of *Haff, Commissioner, v. Yung Poy*, 9 Cir., 68 Fed. 2d 203, *In re Chi Yan Cham Louie*, 70 Fed. Supp. 493, (appeal dismissed,

9 Cir., 166 Fed. 2d 15), and Petition of Wong Choon Hoi, 71 Fed. Supp. 160, (appeal dismissed 9 Cir., 164 Fed. 2d 699), the petitioner may be admitted to citizenship upon taking the oath required by law.

Dated January 14, 1949.

LOUIS E. GOODMAN,
United States District Judge.

Filed Jan. 14, 1949. [27]

[Original]

Date January 24, 1949. List No. 2217. This list consists of one sheet. Sheet No. 1.

ORDER OF COURT

In the District Court of the United States.
United States of America,
Northern District of California—ss.

Upon consideration of the petitions for naturalization listed on List No. 2204; sheet No. 1: dated November 22nd, 1948, presented in open Court the 22nd day of November, A.D. 1948, It Is Hereby Ordered that:

Recommendation of Designated Officer is Disapproved as to the Petition of Yung Poy Listed Below, and said petitioner so listed having appeared in person, It Is Hereby Ordered that he be, and hereby is, admitted to become a citizen of the United States of America. Prayer for change of name listed below granted, all of which is in accordance with order filed January 14, 1949.

Petition No. 88041. Name of Petitioner: Young Poy. Change of Name: Paul Young.

* * * *

By the Court:

LOUIS E. GOODMAN,
Judge.

[Endorsed]: Filed Jan. 24, 1949. C. W. Calbreath,
Clerk. [28]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that The United States of America, Appellant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order and Judgment of the United States District Court for the Northern District of California, Southern Division, made and entered January 24, 1949, in Petition No. 88041, granting the above-named petitioner and appellee Certificate of Citizenship No. 6933500, and admitting him to citizenship.

Dated March 21, 1949.

/s/ FRANK J. HENNESSY,
United States Attorney, Attorney for above-named
Appellant.

[Endorsed]: Filed March 21, 1949. [29]

[Title of District Court and Cause.]

STIPULATION FOR TRANSMITTAL OF
ORIGINAL DOCUMENTS

It Is Hereby Stipulated by and between counsel for appellant and counsel for appellee that the following documents mentioned in the designation of contents of record on appeal shall be transmitted with the appellate record in this case and may be considered by the Court of Appeals in lieu of the certified copies of said immigration files and records of the Department of Justice:

1. Certified copy of petition for naturalization, No. 88041;
2. Certified copy of certificate of arrival, No. 1300-K-15067, dated October 28, 1947; [30]
3. Motion for order of denial, signed by Francis P. Boland, designated examiner, filed November 22, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ EDGAR R. BONSALE,
Assistant United States Attorney, Attorneys for
Appellant.

/s/ NORMAN STILLER,
Attorney for Appellee.

(Acknowledgment of Service.)

[Endorsed]: Filed March 24, 1949. [31]

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF
ORIGINAL DOCUMENTS

By stipulation of counsel, It Is By This Court Ordered, and the Court Does Hereby Order the Clerk of the above-entitled Court to transmit with the appellate record in said cause the originals of the following documents:

1. Certified copy of petition for naturalization, No. 88041;

2. Certified copy of certificate of arrival, No. 1300-K-15067, dated October 28, 1947; [32]

3. Motion for order of denial, signed by Francis P. Boland, designated examiner, filed November 22, 1948.

Done in open Court this 24th day of March, 1949.

/s/ LOUIS GOODMAN,

United States District Judge.

[Endorsed]: Filed March 24, 1949. [33]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above-entitled Court:

The appellant, the United States of America, hereby designates the following to be contained in the record on appeal:

1. Certified copy of petition for naturalization, No. 88041;

2. Certified copy of certificate of arrival, No. 1300-K-15067, dated October 28, 1947;

3. Motion for order of denial of petition, dated November 22, 1948; [34]

4. Transcript of testimony in open Court of petitioner Yung Poy and witness Jennie Young on November 22, 1948;

5. Order of the District Court that petitioner may be admitted to citizenship, dated January 14, 1949;

6. Order of Court admitting petitioner to citizenship, dated January 24, 1949;

7. Statement of facts filed by designated Examiner Francis P. Boland, dated November 22, 1948;

8. Statement of facts filed by Norman Stiller, attorney for petitioner, dated December 31, 1948.

9. Notice of appeal;

10. Stipulation for transmittal of original documents;

11. Order for transmittal of original documents.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ EDGAR R. BONSALE,
Assistant United States Attorney, Attorneys for
Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed March 24, 1949. [35]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying document, listed below, are the originals filed in this court, or true and correct copies of documents filed in the above-entitled case, and that they constitute the record on appeal herein, as designated by the parties,

Copy of the Petition for Naturalization.

Copy of the Certificate of Arrival.

Copy of the Motion for Order for Denial of Petition.

Statement of Facts by F. P. Boland, Designated Naturalization Examiner.

Statement of Facts by Norman Stiller, Attorney for Petitioner.

Copy of Order Admitting Petitioner to Citizenship.

Copy of Order of Court Admitting Petitioner to Citizenship.

Notice of Appeal.

Stipulation for Transmittal of Original Documents.

Order for Transmittal of Original Documents.

Designation of Contents of Record on Appeal.

1 Volume of Reporter's Transcript for November 22, 1948. [36]

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 12th day of April, A.D. 1949.

(Seal) C. W. CALBREATH,
Clerk. [37]

In the Southern Division of the United States
District Court, in and for the Northern District
of California

Before Hon. Louis E. Goodman, Judge.

No. 88,041

In the Matter of the Contested Petition for the
Naturalization of YUNG POY.

REPORTER'S TRANSCRIPT

November 22, 1948, 2:30 p.m.

Counsel Appearing: For the Petitioner Norman Stiller, Esq. For Department of Immigration and Naturalization Francis P. Boland, Esq. [1*]

The Clerk: Petition of Yung Poy. That is No. 20, your Honor. Is that your case, Mr. Stiller?

Mr. Stiller: Yes, your Honor. This is a case that is going to take considerable time. I have no objection to going on with it.

Mr. Boland: I don't know if the Court cares to hear the case in detail at this time, because it involves so many points of law. I believe that the Court would

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

require more detailed statement of the legislation involved, so I prepared a supplemental statement of facts.

The Court: Is this only a question of law and not a question of fact?

Mr. Boland: Yes, your Honor.

Mr. Stiller: Yes, your Honor, there is no character involved or anything except the question of law.

Mr. Boland: I would like to read into the record a statement of facts, because I think there will be an appeal regardless of which way the decision goes.

The Court: Very well.

Mr. Boland: (Reading.)

“The father of petitioner was lawfully admitted to the United States on February 6, 1917, as a merchant under Article II of the Treaty of 1880 with China and the proclamations and statutes enacted to carry it into effect. [2]

“The petitioner, who is of Chinese race and nationality, was born in China on March 24, 1917, and on July 3, 1926, was admitted to the United States at San Francisco, California, as the son of a merchant. Thereafter the father ceased to be a merchant and on September 9, 1932, the petitioner was ordered deported to China on the ground that he had remained in the United States after failing to maintain the exempt status, under which he was admitted, of an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of the present existing treaty of commerce and labor. A writ of habeas corpus was obtained in the District Court at San Francisco and upon the

hearing thereof, it was ordered that the petitioner be discharged from custody. An appeal was taken to the Circuit Court of Appeals, Ninth Circuit, and the order was affirmed. (*Haff v. Yung Poy*, 68 F. 2d 203.)

“On February 1, 1942, the petitioner married a native-born citizen of the United States and on February 17, 1948, filed the present petition for naturalization without a declaration of intention as the spouse of a citizen under the provisions of Section 311 of the Nationality Act of 1940.

“Filed with the petition is a certificate of arrival qualified to show the petitioner’s admission to [3] the United States as the minor son of a merchant under Section 3(6) of the Immigration Act of 1924.”

If counsel has any statement of facts which he would like to add to that?

Mr. Stiller: Yes, well, this is not too important, but I would like to have as part of the statement of facts that there are two children of the marriage of petitioner and his wife, native-born citizens of the United States; and in addition to that—and this is important—in the last paragraph, and this is one of these contentions, the statement is made, “filed with the petition is a certificate of arrival qualified to show the petitioner’s admission to the United States as the minor son of a merchant under Section 3(6) of the Immigration Act of 1924.”

My interpretation of the situation and of the facts is that he was admitted as a minor son of a merchant under the treaty that the United States had with China, the Treaty of 1880. And that has importance in view of the decisions of two district court federal

judges who ruled substantially with the same set of facts we have present here, in favor of the petitioners; and they call attention to that particular fact.

Mr. Boland: Well, then, counsel agrees with the statement of facts except that he contends the entry was under the treaty and not under Section 3(6) of the Act of 1924.

Mr. Stiller: I think that is substantially the statement [4] of fact, that that is correct.

The Court: Well, how about the new law? Does that affect this?

Mr. Stiller: No.

Mr. Boland: Do you mean Section 19(c), which provides——

The Court: I mean with respect to those who have married American citizen spouses, that the original illegal presence in the United States would be forgotten as a defect; does that involve that rule?

Mr. Stiller: Well, if your Honor please—and counsel for the Government will concede this—there is no claim on the part of the Government that this entry is illegal. The only question involved is as to whether it is the type of permanent entry which is good for naturalization purposes. But in a previous case, involving the party, the Circuit Court of Appeals of the United States in this district in effect stated that the petitioner was here for permanent residence and could remain indefinitely. There are other people in the same category as the petitioner.

Now with regard to this law that you have mentioned that has to do with people who are here illegally, who have come in as visitors and over ex-

tended leave, or come in as stowaways or were smuggled in in some capacity; that is not true of the petitioner in this case. There is a record of his arrival in the United States and the Service is in possession of [5] all the facts concerning his arrival.

The Court: Well, the petition is resisted, I take it, by the Naturalization Department because they claim that at a certain point he was no longer, and could no longer lawfully remain, in the United States. Is that the point?

Mr. Stiller: No, that isn't—

Mr. Boland: Well, we got a little bit away from the plan I had of presenting the case. I had intended just to have counsel take exception to my statement of facts if he so desired.

Mr. Stiller: Well, I would like to answer the Judge's questions.

The Court: Well, I understand that. I am just trying to find out what the question is.

Mr. Boland: Well, the question is simply, is he lawfully admitted to the United States for permanent residence within the meaning of the Nationality Act, Section 311 of the Nationality Act, under which his petition is filed. That section requires a lawful entry for permanent residents.

Now it is the contention of the Government that he entered under Section 3(6) of the Immigration Act of 1924, which section provides for the entry into the United States of treaty traders, of merchants, who enter under a treaty. Now a person who enters under the treaty must maintain status, or at least, the very least, his status is not that of an immigrant for [6] permanent residence. It is an entry for a

limited purpose only. This petitioner, entering for a limited purpose, does not come within the meaning of the Nationality Act.

The Court: Oh, I see.

Mr. Boland: Which requires lawful and unlimited entry for any purpose whatsoever.

The Court: You mean that a man who comes in as a merchant is not entitled to the benefit?

Mr. Boland: Yes, the same as an ambassador.

Mr. Stiller: I would like to correct certain statements that were made there that are not entirely correct.

The Court: Well, I am not desirous of getting into an argument as to the facts; all I am trying to find out is what the question is from your point of view, the issue in this case; what you are contending for is that a man who comes in, as did the plaintiff in this case, as a merchant or as the son of a merchant, I think you said, didn't you?

Mr. Boland: The son of a merchant.

The Court: Yes. That he does not acquire by that status a status which entitles him to become an American citizen; is that right?

Mr. Stiller: Well, with this exception, your Honor, even in that limited statement: The situation would depend whether they come in before July 1, 1924, or after that date. I mean, to show the ridiculous position the Government has put [7] itself into, that is what they have ruled, that all treaty merchants, Chinese treaty merchants and their sons, who came in before July 1, 1924, had that type of entry which entitles them to become citizens. Those that entered after that date have not. I think the Government

will concede that. And in fact, that was drawn upon as——

The Court: Well, I see what the issue is. I guess you had better submit briefs in that matter. Is that what you have in mind?

Mr. Boland: Yes, your Honor, I have prepared a more detailed statement of facts, and the statement of law; and also, for the convenience of the Court, there were two other similar cases decided, one in, I think it was in Portland, and one in Los Angeles—both were decided adversely to the Government. Appeals were taken to the Ninth Circuit Court and they were dismissed because they were not taken by the proper party. So if the Court is interested, I could leave the briefs here.

The Court: All right. Now do you want to have this considered as the opening brief, Mr. Boland?

Mr. Boland: Yes, your Honor.

The Court: How much time do you want to answer, counsel?

Mr. Stiller: Twenty days, your Honor.

The Court: Twenty days? And then do you wish to reply, file a final memorandum?

Mr. Boland: I would like to have the right to reply, [8] but I don't know that I will necessarily at that time.

The Court: All right, twenty days to the petitioner and twenty days to reply on the part of the Government.

Mr. Stiller: If your Honor please, the petitioner and his wife are both in the court. It may be that your Honor will desire to examine them. I don't know to what extent equitable considerations will

enter into this, or any considerations other than the point of law involved; but the judges in the other two cases, which are similar, did examine the petitioners.

The Court: Well, if you think that it would be helpful, have them come up and you may bring out whatever you wish.

Mr. Stiller: All right.

Mr. Boland: We have no objection to the petitioner on any other ground, than the grounds stated—the technical ground that there was not filed with the petition a valid certificate of arrival showing the date, place, and manner of the petitioner's arrival and whether the petitioner has or has not established continuous legal residence within the United States, as required by law. That is what it boils down to; that means simply that he does not have a lawful entry for permanent residence. That is the sole issue that we care to raise.

The Court: Well, have them both come up and you can ask them such questions as you want.

Mr. Stiller: The record will show that he has been sworn in, and that might be of some—— [9]

PAUL YUENG,
called in his own behalf; sworn.

Q. (By the Clerk): Will you state your name to the Court?

A. Paul Yueng, Y-u-e-n-g.

Direct Examination

Q. (By Mr. Stiller): Mr. Yueng, you came to the United States in 1926, is that correct?

A. That is right.

Q. And you have lived in the United States since that time? A. Yes, sir.

Q. And you were born in 1917, is that right?

A. 'That's right.

Q. Then you came in as a boy of nine years of age, is that correct? A. That's right.

Q. And you have received your schooling here in the United States, is that correct?

A. That's right.

Q. Are you married? A. Yes.

Q. Is your wife a citizen of the United States?

A. Yes.

Q. Native-born citizen? A. Yes.

Q. Do you have any children? [10]

A. Yes.

Q. How many children? A. Two.

Q. Are they native-born citizens of the United States? A. Yes.

Q. Have you ever been back to China for any extended visit or trips? A. No.

Q. Are your sympathies and loyalties with the United States? A. Yes.

Mr. Stiller: If your Honor please, this petitioner has passed a satisfactory examination in government; all I am trying to bring out by these questions is that he is thoroughly American in every sense of the word.

The Court: Q. Where did you go to school?

A. I went to school in San Jose.

Q. In San Jose? A. Yes.

Q. What school?

A. When I started, Grant School.

Q. You went to Grant School; that is a grammar school?

A. Yes, and then I come up here and went to Francisco Junior High.

Q. In San Francisco?

A. Yes. And then I went to North Point Diesel, to study Diesel [11] Engineering.

Q. And how old are you now?

A. Thirty-one.

Q. Thirty-one. Now during the war, the last war, what did you do?

A. I was working at the Atlas Imperial Diesel Engine Company.

Q. What did you do there?

A. I was doing replacement for the shop works. I went there to operate the lathe, but I didn't show up at that job, I run—most of the time all I did is the drill press layout.

Q. And what was your status under the draft law, what were you classified as? A. 1-A.

Q. And did they reject you for military duty?

A. No, I had two weeks to go before I would go into the Armed Forces, and I was all ready to go in, but the company appealed in Washington, see, and they appealed in, they sent a man over to my draft board. They deferred me.

Q. They deferred you because of your occupation? A. Yes.

Q. Did you buy any bonds during the war?

A. Yes.

Q. How much did you buy?

A. Every week I got one bond.

Q. Every week. And how many did you get altogether? [12] A. Oh, I think about——

Q. How many did you accumulate?

A. I think about 40 or 50 bonds.

The Court: That is all. Is the wife here?

Mr. Boland: Do you want the wife's testimony?

Mr. Stiller: She may take the stand, your Honor.

The Court: All right, that is all.

(Witness excused.)

JEANNIE YEUNG,

called on behalf of the petitioner; sworn.

Q. (By the Clerk): Will you state your name to the Court, please? A. Jeannie Yueng.

Direct Examination

Q. (By Mr. Stiller): Mrs. Yueng, you are married to the petitioner, whose real name, Yung Poy—he wishes his name changed to Paul Young, is that correct? A. Yes.

Q. And how long have you been married to him?

A. Six years.

Q. And you are a native-born citizen of the United States, is that correct? A. Yes.

Q. You have two children by the petitioner? [13]

A. Yes.

Q. Now, if your husband were denied American citizenship for some technical reason, would that work a hardship if he were ordered deported back to China? A. Yes, it would.

Q. Would you have means of support for your family and yourself?

A. Well, it makes it kind of hard. I don't think—

Mr. Boland: That is not involved, because if it is a hardship case, there are provisions against, as you know, deportation.

Mr. Stiller: Well, I just wanted to bring out the facts, your Honor, that she is entirely dependent upon him for support.

The Court: Q. Where were you born, Mrs. Yeung? A. Alviso, California.

Q. And where did you go to school?

A. Well, I went to grammar school there, and then when we moved up here, went to Francisco.

Q. Did you go to Francisco, too?

A. Yes.

Q. How old are you now?

A. Twenty-nine.

Q. Are you employed, too, do you work too?

A. Well, right now, yes.

Q. And what is your employment?

A. Sales girl, sales clerk. [14]

Q. Sales clerk. I see. Here in San Francisco?

A. Yes.

The Court: Anything else you want to present?

Mr. Stiller: Not from the witness. I just wanted to point out, your Honor——

The Court: That is all.

(Witness excused.)

Mr. Stiller: ——that due to the technicalities present in this case, it is very difficult for the petitioner to legalize his entry in such a manner that he would be eligible for citizenship.

The Court: You can point that out in the brief. You can point out anything you wish in the brief. I will mark it submitted, 20 and 10, then.

CERTIFICATE OF REPORTER

I, Eldon N. Rich, Official Reporter, pro tem, certify that the foregoing 15 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

[Endorsed]: Filed Apr. 7, 1949.

[Endorsed]: No. 12225. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Yung Poy, also known as Paul Young, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed April 13, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12225

THE UNITED STATES OF AMERICA,
Appellant,

vs.

YUNG POY, also known as PAUL YOUNG; In the
Matter of the Petition of YOUNG POY, also
known as PAUL YOUNG, to be admitted a citi-
zen of the United States of America,
Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY IN THE
APPEAL IN THE ABOVE-ENTITLED MAT-
TER

Comes now the United States of America, by and
through Frank J. Hennessy, United States Attorney,
and Edgar R. Bonsall, Assistant United States At-
torney for the Northern District of California, and
files herein the Statement of Points on which Ap-
pellant intends to rely in the appeal in the above-
entitled matter:

I.

The District Court erred in holding and deciding
that the appellee was admitted to the United States
for permanent residence under the Treaty of Com-
merce and Navigation with China in 1888 (22 Stat.
826) for naturalization purposes.

II.

The District Court erred in holding and deciding that appellee's admission to the United States constituted lawful permanent residence for naturalization purposes.

III.

The District Court erred in failing to hold and decide that appellee was admitted to the United States temporarily as a non-immigrant alien under Section 3(6) of the Act of May 26, 1924, Title 8 U.S.C.A. 203.

IV.

The District Court erred in admitting appellee to citizenship.

Dated this 29th day of March, 1949.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ EDGAR R. BONSALE,
Assistant United States Attorney, Attorneys for
Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed April 13, 1949. Paul P. O'Brien,
Clerk.

No. 12,225

IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,	}
vs.	
YUNG POY, also known as Paul Young,	
	<i>Appellant,</i>
	<i>Appellee.</i>

BRIEF FOR APPELLANT.

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FILED
JUN 21 1949

PAUL P. O'BRIEN, ~
CLERK

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IN THE
United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

YUNG POY, also known as Paul Young,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTION.

The petition of appellee for admission to citizenship under Section 311 of the Nationality Act of 1940 (54 Stat. 1145; 8 U.S.C. 711) was filed in the United States District Court on February 17, 1948 (R. p. 5).

The jurisdiction to naturalize aliens as citizens of the United States is conferred upon the District Courts by Section 301(a) of the Nationality Act of 1940 (54 Stat. 1140; 8 U.S.C. 701(a)).

The decision of the District Court granting the petition was filed January 14, 1949 (R. 42) and order admitting appellee to citizenship was entered on January 24, 1949 (R. 43). Notice of appeal was filed on

March 21, 1949 (R. 43) and transcript of record was filed in this Honorable Court on July 13, 1949 (R. 60).

Jurisdiction is conferred upon this Honorable Court to review the final judgments of the district courts of the United States by Section 128 of the Judicial Code, as amended (Title 28 U.S.C. 1291) wherein it is provided that

“The Court of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States * * * except where a direct review may be had in the Supreme Court.”

The order of the District Court in granting the petition and admitting appellee to citizenship is a final decision within the meaning of the above law.¹

TREATIES, PROCLAMATIONS, STATUTES AND REGULATIONS.

Treaty between the United States and China, concerning immigration.²

“By the President of the United States of America.

A PROCLAMATION

‘Whereas a Treaty between the United States * * * and China, for the modification of the existing treaties between the two countries, by pro-

¹*Tutun v. U. S.*, 270 U.S. 568, 46 S.Ct. 425, 70 L.Ed. 738; *U. S. v. Rodiek*, 162 Fed. 469 (9th Cir.).

²22 Stat. L. 826; concluded Nov. 17, 1880; ratification advised by the Senate May 5, 1881; ratified by the President May 9, 1881; ratifications exchanged July 19, 1881; proclaimed Oct. 5, 1881.

viding for the future regulation of Chinese immigration into the United States, was concluded and signed at Peking * * * on the seventeenth day of November in the year of our Lord one thousand eight hundred and eighty * * * which Treaty is word for word as follows:

‘Whereas, in * * * 1858, a treaty of peace and friendship was concluded between the United States of America and China, and to which were added, in * * * 1868, certain supplementary articles to the advantage of both parties, which supplementary articles were to be perpetually observed and obeyed:—and

‘Whereas the Government of the United States, because of the constantly increasing immigration of Chinese laborers to the territory of the United States, and the embarrassments consequent upon such immigration, now desires to negotiate a modification of the existing Treaties which shall not be in direct contravention of their spirit:—

‘Now, therefore, * * * the said Commissioners Plenipotentiary, having conjointly examined their full powers, and having discussed the points of possible modification in existing Treaties, have agreed upon the following articles in modification:

ARTICLE I.

‘Whenever, in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees

that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it.³ The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

ARTICLE II.

‘Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to

³Affected by various provisions of law, prohibiting the admission of Chinese laborers to the United States. By an Act of Congress of May 6, 1882, as amended and added to by the Act of July 5, 1884, enforcement of the Exclusion Treaty with China was provided for: “* * * until the expiration of ten years next after the passage of this Act, the coming of Chinese Laborers to the United States * * * is * * * suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come, to remain within the United States.” (22 Stat. L. 58; 23 Stat. L. 115). The Act of May 6, 1882, as amended, and added to by the Act of July 5, 1884, was continued in force for an additional period of 10 years from May 5, 1892, by the Act of May 5, 1892 (27 Stat. L. 25); and was, with all laws on this subject in force on April 29, 1902, reenacted, extended, and continued without modification, limitation, or condition by the Act of April 29, 1902 (32 Stat. L. 176) as amended by the Act of April 27, 1904 (33 Stat. L. 428).

the citizens and subjects of the most favored nation.

ARTICLE III.

‘If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty.

ARTICLE IV.

‘The high contracting powers having agreed upon the foregoing articles, whenever the Government of the United States shall adopt legislative measures in accordance therewith, such measures will be communicated to the Government of China. If the measures as enacted are found to work hardship upon the subjects of China, the Chinese minister at Washington may bring the matter to the notice of the Secretary of State of the United States who will consider the subject with him; and the Chinese Foreign Office may also bring the matter to the notice of the United States minister at Peking and consider the subject with him, to the end that mutual and unqualified benefit may result.

‘In faith whereof the respective Plenipotentiaries have signed and sealed the foregoing at Peking * * * the ratification of which shall be exchanged at Peking within one year from date of its execution.

‘Done at Peking, this seventeenth day of November, in the year of our Lord, 1880. * * *

‘And whereas the said Treaty has been duly ratified on both parts and the respective ratifications were exchanged at Peking on the 19th day of July 1881;

‘Now, therefore, be it known that I, Chester A. Arthur, President of the United States of America have caused the said Treaty to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

‘Done in Washington this fifth day of October in the year of our Lord one thousand eight hundred and eighty-one, * * * ’

The convention regulating Chinese immigration was concluded March 17, 1894, by which immigration of Chinese laborers was prohibited for ten years. By Article IV of that convention it was provided:

“In pursuance of Article III of the Immigration Treaty between the United States and China, signed at Peking on the 17th day of November, 1880 * * * it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens* * * *.” (Italics supplied.)

By an amendment to “an act to execute certain treaty stipulations relating to Chinese,” Congress, on

November 3, 1893, defined the term "merchant" as follows:⁴

"Sec. 2 * * * the term 'merchant', as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other:

'A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.' "

In the Act of November 3, 1893, Congress also defined a "Domiciled merchant" as follows:⁵

"Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two creditable witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, *and in default of such proof shall be refused landings.*" (Italics supplied.)

The Immigration Act of May 26, 1924 "to limit the immigration of aliens into the United States," defines its scope:⁶

⁴(28 Stat. L. 7.)

⁵(Same as 4.)

⁶(43 Stat. 166; 8 U.S.C. 223.)

“Sec. 25. The provisions of this Act are in addition to and not in substitution for the provisions of the Immigration Laws, and shall be enforced as a part of such laws, * * * not inapplicable, shall apply to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the Immigration Laws other than this Act, and an alien, although admissible under the provisions of the Immigration Laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act.”

The 1924 Immigration Act classifies all aliens entering the United States for permanent residence as “immigrants” and “non-quota immigrants”, excepting from such definition those entering temporarily or during a period requiring the maintenance of status. This latter group is commonly referred to as “non-immigrants”. The statute is in the following language:⁷

“Sec. 3. When used in this Act the term ‘immigrant’ means any alien departing from any place outside the United States destined for the United States, except (1) an accredited official of a foreign government * * *, (2) an alien visiting the United States * * *, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous

⁷(43 Stat. 154; 47 Stat. 607; 54 Stat. 711; 8 U.S.C. 203; Sec. 7(c) Public Law 291, 79th Congress; Chap. 652.1, Sess., approved Dec. 29, 1945.)

territory, (5) a bona fide alien seaman * * *, and (6) an alien entitled to enter the United States solely to carry on trade between the United States and a foreign state of which he is a National under and in pursuance of the provisions of a treaty of commerce and navigation, and his wife, and his unmarried children under 21 years of age, if accompanying or following to join him * * *, and (7) a representative of a foreign government in or to an international organization * * * or an alien officer or employee of such * * * organization, and the family, attendants, servants and employees * * *."

Prior to amendment of July 6, 1932, the sixth subdivision of Section 3 read as follows:⁸

"(6) An alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

"Immigrant" as above defined and "non-quota immigrant" included in the following definition, constitute the classes of aliens whose admission to the United States is authorized for lawful permanent residence under the 1924 Immigration Act:⁹

⁸Act of July 6, 1932 (47 Stat. 607; 8 U.S.C. 203) amending Sec. 3, Act of May 26, 1924 (43 Stat. 154; 8 U.S.C. 203).

⁹(43 Stat. 155; 44 Stat. 812; 45 Stat. 1009; 46 Stat. 854; 47 Stat. 656; 8 U.S.C. 204). The Sec. 4(e) student "nonquota immigrant" is by act of Congress specifically taken out of the class of aliens admitted for permanent residence by Sec. 15 Immigration Act of 1924 (43 Stat. 162; 47 Stat. 524, 525; 54 Stat. 711; 57 Stat. 669; 8 U.S.C. 215, Sec. 7(d), and is subject to deportation if he fails to maintain status under regulations promulgated thereunder providing "A student who violates or fails to fulfill any of the conditions of his admission * * * shall be made the

“Sec. 4. When used in this Act the term ‘non-quota’ immigrant means—‘(a) An immigrant who is the unmarried child under twenty-one years of age, or the wife, or the husband, of a citizen of the United States: Provided, that the marriage shall have occurred prior to issuance of visa and, in the case of husbands of citizens, prior to July 1, 1932.’ ‘(b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad.’ ‘(c) An immigrant who was born in * * * Canada * * * Mexico’ etc. ‘(d) An immigrant who * * * seeks to enter the United States solely for the purpose of, carrying on the vocation of minister,’ etc. ‘(e) An immigrant who is a bona fide student * * * who seeks to enter the United States solely for the purpose of study,’ etc. ‘(f) A woman who was a citizen of the United States and lost her citizenship by reason of her marriage to an alien,’ etc.”

Section 15 of the Immigration Act of 1924¹⁰ requires maintenance of the exempt status of aliens admitted to the United States who are excepted from the * * * definition of Immigrant and nonquota immigrant.

“Section 15. The admission to the United States of an alien excepted from the class of immigrants by clause 1, 2, 3, 4, 5, 6 * * * of section 3 * * * shall be for such time, and under such conditions as may be by regulations prescribed

subject of deportation proceedings in accordance with the provisions of the applicable immigration laws * * *.” (Sec. 125.5 Title 8, C.F.R.).

¹⁰(43 Stat. 162; 47 Stat. 524; 54 Stat. 711; 59 Stat. 669; 8 U.S.C. 215).

* * * to insure, that at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States * * *."

The terms "status" and "trader's status" as used in the Immigration Act of 1924, are defined in regulations promulgated by the Commissioner of Immigration and Naturalization with the approval of the Attorney General as follows:¹¹

"The term 'status' as used in the Immigration Act of 1924 means the condition of carrying on one of the particular limited activities for which an alien may be admitted under a subdivision of Section 3 of that Act (43 Stat. 154, 47 Stat. 607; 8 U.S.C. 203). * * * When applied to an alien * * *; the term 'trader's status' means that he is admissible under Section 3 (6) and is an alien entitled to enter and to remain in the United States solely to carry on trade between the United States and the foreign state of which he is a national under and in pursuance of the provisions of a treaty of commerce and navigation, or the wife or unmarried child under 21 years of age of a person so entitled whom he accompanies or follows to join."

Certain non-immigrants are admitted without time limitation so long as the status under which admitted is maintained.¹²

"The admission of the aliens (officials, visitors and traders) * * * shall be * * * on condition that the alien shall maintain during his temporary

¹¹Sec. 110.27, Title 8 C.F.R., authorized by Sec. 24, Immigration Act of 1924 (43 Stat. 166; 8 U.S.C. 224).

¹²Sec. 110.29(a),(b),(c) Title 8 C.F.R.

stay in the United States the specific status claimed, and shall voluntarily depart therefrom 'at the expiration of the time fixed, or upon failure to maintain the specific status under which admitted. * * *'

“(a) * * * a government official and his family shall be admitted without limitation of time * * *; (b) * * * an alien having a trader's status shall be admitted without limitation of time; (c) * * * an alien who has been admitted as the unmarried minor child of a treaty trader shall be regarded as having maintained his specific status so long as his parent maintains his trader's status.”

Rule 18, paragraph 5, of the Chinese Rules of October 1, 1926 (Sec. 54.4 8 C.F.R. pp. 163-4) promulgated by the Commissioner of Immigration, with the approval of the then Secretary of Labor, under authority contained in Section 24 of the Immigration Act of 1924, provided as follows:¹³

“Sec. 54.4. Aliens who have been admitted as non-immigrants * * * under Section 3 * * * of the Immigration Act of 1924 * * *, and aliens admitted under Section 3 (6) of said Act as non-immigrants (together with their alien wives and minor children admitted at the same time or subsequently) who shall fail or refuse to maintain the status under which admitted, or to depart voluntarily when they have ceased to maintain such status; shall be taken into custody upon the warrant of the Secretary of Labor and deported in the manner provided by Section 14 of the Immigration Act of May 26, 1924.”

¹³(43 Stat. 166; 8 U.S.C. 224.)

Provision is made in the Immigration Act of 1924 for the deportation of¹⁴

“any alien who at any time after entering the United States is found * * * to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in Sections 19 and 20 of the Immigration Act of 1917 * * *.”

In enacting legislation for the repeal of the Chinese Exclusion Laws¹⁵ the Congressional Committee, considering the legislation, had the following comment to make:¹⁶

“The number of Chinese who will actually be made eligible for naturalization under this Section is negligible. There are approximately 42,000 alien Chinese persons in the United States (37,242 in continental United States and 4,844 in Hawaii, according to the census figures of 1940). However, a large number of these Chinese have never been admitted to the United States for lawful permanent residence, which is a condition precedent to naturalization and, therefore, many of this number would not be eligible for naturalization, not because of racial disability but because they cannot meet existing statutory requirements of law. The number of Chinese who will be made eligible in the future, in addition to those already here, will of necessity be very small because the

¹⁴Sec. 14, Immigration Act of 1924 (43 Stat. 162; 8 U.S.C. 214).

¹⁵On Dec. 17, 1943, Congress passed the Chinese Exclusion Repeal Act (57 Stat. 600).

¹⁶House Rep. 732; Sen. Rep. 535; 78th Congress, 1st Sess. (p. 6 of Sen. Rep. 535).

quota for China is limited to 105 per annum, as provided in Section 2 of this bill.”

In discussing the purpose of the repeal of the Chinese Exclusion Acts the Congressional Committee made the following comment:¹⁷

“The purpose of this section is to repeal all of the laws enacted between 1882 and 1913, dealing with the exclusion and deportation of Chinese persons. It should be stated at this point that no substantial gain accrues to the Chinese people through the repeal of these laws from a standpoint of permitting Chinese to enter the country who are at present denied that privilege because other provisions of laws subsequently enacted effectively keep out persons of the Chinese race as well as persons of other races ineligible to citizenship. It does, however, eliminate the undesirable laws specifically designating Chinese as a race to be excluded from admission to the United States.”

The following provisions of the Nationality Laws and Regulations require, as a condition precedent to establishing a residence for naturalization purposes, that an alien be admitted for lawful permanent residence. At the time of the admission of the appellee into the United States the Naturalization laws required a registry of all aliens to be made.¹⁸ As a pre-

¹⁷Sen. Rep. 535, 78th Congress, 1st Sess. (p. 3 referring to Sec. 1).

¹⁸Sec. 328(a), Nationality Act of 1940 (54 Stat. 1151-52; 8 U.S.C. 728), effective Jan. 13, 1941. The language in this section was derived from a similar provision in the basic Naturalization Act of June 29, 1906, which was recast herein without material change. See Chap. 3592, sec. 1, 34 Stat. 596, which reads:

“That it shall be the duty of the Bureau of Immigration * * * to provide, for use at the various Immigration stations through-

requisite to the issuance of a valid declaration of intention the Nationality Act of 1940 requires that lawful entry for permanent residence be established.¹⁹

“No declaration of intention shall be made by any person who arrived in the United States after June 29, 1906, until such person’s lawful entry for permanent residence shall have been established, and a certificate showing the date, place and manner of arrival in the United States shall have been issued. It shall be the duty of the Commissioner, or Deputy Commissioner, to cause to be issued such certificate.”

The applicant, when declaring his intention for naturalization, must also swear to a recital of lawful

out the United States, books of record, wherein the Commissioners of Immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this Act, of the name, age, occupation * * * the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and * * * the name of the vessel in which he comes.”

Historically, registry of aliens for naturalization purposes made its first appearance in the naturalization laws in the Act approved June 18, 1798 (1 Stat. 566-569) requiring: “* * * that all * * * aliens who, after the passing of this Act, shall continue to reside, or who shall arrive or come to reside in any part or place within the territory of the United States, shall be reported * * * to the Clerk of the District Court of the District, if living within ten miles of the port or place in which their residence or arrival shall be, and otherwise, to the Collector of such port or place, or some officer or other person there, * * * who shall be authorized by the President of the United States, to register aliens; * * * in respect to every alien who shall come to reside within the United States * * * the time of the registry of such alien shall be taken to be the time when the term of residence within the limits and under the jurisdiction of the United States, shall have commenced, in case of an application by such alien to be admitted as a citizen of the United States; and a Certificate of such registry shall be required in proof of the term of residence by the Court to whom such application shall and may be made.”

¹⁹Sec. 329(b), Naturalization Act of 1940 (54 Stat. 1152; 8 U.S.C. 729).

admission for permanent residence in his declaration of intention.²⁰

“An applicant for naturalization shall make, under oath * * * substantially the following averments * * * (11) My lawful entry for permanent residence in the United States was at (city or town) (State) under the name of on (month, day and year) on the (name of vessel or other means of conveyance).”

The Nationality Act of 1940 requires that in the petition for naturalization the applicant also swears to a recital of lawful admission for permanent residence as follows:²¹

“An applicant for naturalization shall * * * make and file in the Office of the Clerk of a Naturalization Court * * * a sworn petition in writing, signed by the applicant * * * which petition shall contain substantially the following averments by such applicant—(11) My lawful entry for permanent residence in the United States was at (city or town) (State) under the name of..... on (month, day and year) on the (name of vessel or other means of conveyance) as shown by the certificate of my arrival attached to this petition.”

Under regulations promulgated under the authority of the Attorney General, it is provided that an alien:²²

“* * * in order to be eligible for naturalization upon petition for naturalization to a Nat-

²⁰Sec. 331(a) (11) Naturalization Act of 1940 (54 Stat. 1153-54, 8 U.S.C. 731).

²¹Sec. 332(a) (11), Naturalization Act of 1940 (54 Stat. 1154-56; 8 U.S.C. 732).

²²Sec. 322.1, Title 8 C.F.R., issued under authority of Sec. 327 of the Naturalization Act of 1940 (54 Stat. 1150; 8 U.S.C. 727).

uralization Court, shall, unless specifically exempted as set forth in sub-chapter D of this Title: (b) have been lawfully admitted to the United States for permanent residence.”

STATEMENT OF THE CASE.

Appellee filed his petition to become a citizen of the United States as the husband of a United States citizen, before the Clerk of the United States District Court for the Northern District of California, Southern Division, on February 17, 1948 (R. 5). As the husband of a citizen he was exempt from the requirement of declaring his intention (8 U.S.C. 711).

There was also filed with the petition for naturalization a qualified certificate of arrival, attesting that appellee had been lawfully admitted to the United States as the minor son of a merchant (R. 7), under Section 3 (6) of the Immigration Act of 1924 (8 U.S.C. 203).

The certificate of arrival, attached to the petition, is a qualified one issued by the Commissioner of Immigration and Naturalization solely for the purpose of permitting the filing of a petition for citizenship in order that the petitioner might present to the Court the circumstances attending his entry and does not purport to verify the legal admission of the petitioner for permanent residence in the United States (R. 7).

On November 22, 1948, there was filed in the District Court of the United States for the Northern

District of California, Southern Division, a list of petitions recommended to be denied, including as one of the items therein, the name of the appellee (R. 8 and 9), the reason for the recommendation of denial of petition being (1) that there was not filed with the petition a valid certificate showing the date, place and manner of petitioner's arrival in the United States, and petitioner has not established exemption from such requirement; and (2) petitioner has failed to establish continuous legal residence in the United States for the period required by law. (R. 9.)

The petition of appellee was heard in open Court on November 22, 1948, and the District Judge signed an order admitting appellee to citizenship on January 14, 1949. (R. 41-42.) Thereafter on January 24, 1949 the recommendation of denial was disapproved and the petitioner took his oath of citizenship on the same day. (R. 42-43.) Notice of appeal was thereafter filed with the Court on March 21, 1949. (R. 43.)

SUMMARY OF THE FACTS.

Appellee is an alien, a citizen of China, born March 24, 1917. (R. 2.) Appellee's father was lawfully admitted to the United States on February 6, 1917, under the status of a Chinese merchant, pursuant to Article II of the Treaty of 1880 between the United States and China. (R. 49.) On July 3, 1926, appellee was lawfully admitted to the United States under the status of "son of a merchant" under Section

3(6) of the Immigration Act of 1924.²³ (R. 10 and 49) Thereafter the father ceased to be a merchant (R. 10 and 49) and appellee was ordered deported to China on the ground that he had remained in the United States after failing to maintain the exempt status under which he was admitted as an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of the present existing treaty of commerce and labor. (R. 10 and 49.) A writ of habeas corpus was issued by the District Court at San Francisco, and upon the hearing thereof, it was ordered that the petitioner be discharged from custody. An appeal was taken to this Court and the order was affirmed. (*Haff v. Yung Poy*, 68 F. (2d) 203.)

On February 1, 1942, the petitioner married a native-born citizen of the United States, and on February 17, 1948, filed the present petition for naturalization without a declaration of intention as the spouse of a citizen under the provisions of Sec. 311 of the Nationality Act of 1940. (R. 50.)

SPECIFICATIONS OF ERROR.

(1) The District Court erred in holding and deciding that the appellee was admitted to the United States for permanent residence under the Treaty of Commerce and Navigation with China in 1888 (22 Stat. 826) for naturalization purposes.

²³Sec. 3(6) Act of 1924 (43 Stat. 154 as amended; 8 U.S.C. 203).

(2) The District Court erred in holding and deciding that appellee's admission to the United States constituted lawful permanent residence for naturalization purposes.

(3) The District Court erred in failing to hold and decide that appellee was admitted to the United States temporarily as a non-immigrant alien under Section 3(6) of the Act of May 26, 1924, Title 8 U.S.C.A. 203.

(4) The District Court erred in admitting appellee to citizenship.

ARGUMENT.

THE APPELLEE DOES NOT MEET THE LAWFUL PERMANENT RESIDENCE REQUIREMENT WHICH IS A CONDITION PRECEDENT TO NATURALIZATION.

The facts are not in dispute and the sole issue is whether appellee's admission under the immigration and naturalization laws constitutes a "*lawful entry for permanent residence*"²⁴ within the meaning of the Nationality Act of 1940. No question is raised as to whether appellee has resided continuously in the United States for the required period of two years

²⁴Secs. 328(a), 329(a)(b), 331, allegation (11), 332(a) allegation (11) and subdivisions (b) and (c), Nationality Act of 1940 (54 Stat. 1151-1152, 8 U.S.C. 728(a); 54 Stat. 1152, 8 U.S.C. 729(a)(b); 54 Stat. 1153-1154, 8 U.S.C. 731, averment (11); 54 Stat. 1154-1156, 8 U.S.C. 732(a), averment (11) (b)(c).) Sec. 322.1, Title 8 C.F.R., provides that an alien "* * * in order to be eligible for naturalization upon a petition for naturalization to a naturalization court shall * * *: (b) have been lawfully admitted to the United States for permanent residence." (Emphasis added).

“immediately preceding the date of filing * * * petition” for naturalization.²⁵ Lawful admission for permanent residence within the contemplation of the Nationality Laws does not include an entry which depends for its permanency and continued legal existence upon the maintenance of a particular status, as, for example, an alien admitted under the immigration status of a recognized “accredited official of a foreign government.”²⁶ Like the merchant²⁷ his admission under the law is without specific time limitation so long as the legal status under which admitted of “accredited official” or “merchant” is maintained. Admission for lawful permanent residence as an “immigrant” or “nonquota immigrant”²⁸ carries no restrictions as to occupation, profession or limitation as to time. So long as an alien so admitted does not

²⁵Secs. 309(a) and 311 of the Nationality Act of 1940 (54 Stat. 1143, 8 U.S.C. 709; 54 Stat. 1145, 8 U.S.C. 711). These two sections refer to the continuity of residence to be maintained (under the general law for five years) immediately preceding the filing of the petition for naturalization. Being married to a United States citizen after Jan. 13, 1941, appellee, having resided with his United States citizen spouse for over one year, was required to establish but two years' residence and was exempt from the filing of the declaration of intention.

²⁶Sec. 3(1), Immigration Act of 1924 (43 Stat. 154; 47 Stat. 607; 54 Stat. 711; 8 U.S.C. 203; Sec. 7 (c), Public Law 291, 79th Congress; Chapter 652, First Session; approved December 29, 1945); Sec. 15, Immigration Act of 1924 (43 Stat. 162; 8 U.S.C. 215); Secs. 110.27 and 110.29(a), Title 8, C.F.R.

²⁷Same as note 25, except “merchant” is provided for under Sec. 3(6) of the Immigration Act of 1924 and the limitation as to purpose referring to “merchant” is included in subdivisions (b) and (c) of Sec. 110.29, Title 8 C.F.R.

²⁸Sec. 3, Immigration Act of 1924 (43 Stat. 154; 8 U.S.C. 203); Sec. 4, same act, subdivisions (a) to (f), inclusive (43 Stat. 155; 44 Stat. 812; 45 Stat. 109; 46 Stat. 854; 47 Stat. 656; 8 U.S.C. 204). See footnote 9 for specific statutory exception both as to time and purpose with respect to students admitted under Sec. 4(e) of the 1924 Act.

abandon his legal residence status thus acquired, he is relieved from further obligation under the immigration laws. It is only the latter type of admission that will meet the requirements of the naturalization laws. *The starting point of residence prerequisite to naturalization is the entry of an alien under an immigration status for "lawful permanent residence" evidence of which is the record of registry of entry from which a certificate of arrival may be issued certifying that the admission was for lawful permanent residence.* Concededly, the question of whether a temporary absence breaks the continuity of the prescribed period of residence immediately preceding filing of the petition for naturalization may be determined by the general rule used in establishing "residence" or "domicile" except as limited by the Naturalization Statutes.²⁹ Such rule is not, however, applicable in determining whether the commencement of the residence is unrestricted and not dependent upon the maintenance of a particular status within the contemplation of the Nationality Laws. It is settled that such residence cannot result from a mere sojourn in the United States, no matter how protracted.³⁰ Citizenship was cancelled following a long period of residence where the entry upon which naturalization was founded originated from an entry prior to the Immigration Act of 1924 as a stowaway.³¹ Although "residence" or "domicile" may legally be established for

²⁹*U. S. v. Silver*, 55 F.(2d) 250.

³⁰*Kaplan v. Tod*, 267 U.S. 228, 45 S.Ct. 257, 69 L.Ed. 585; *Zartavian v. Billings*, 204 U.S. 170, 175, 27 S.Ct. 182, 184, 51 L. Ed. 428.

³¹*U.S. v. Parisi*, 24 Fed.Supp. 414.

many purposes, such as for divorce, charity, etc., by an alien admitted under the legal status of a temporary visitor, it is not sufficient for naturalization.³² It is equally well settled that an alien cannot meet the legal resident status, requisite for naturalization, although lawfully admitted without time limitation prior to the Immigration Act of 1924, on the basis of his having been found not subject to deportation.³³ In discussing the legal effect of the certificate of arrival in the latter case, the court stated that

“* * * proof of an essential fact is short. It did not show that he was *admitted for permanent residence*. That makes it impossible for him to prove what was necessary even before the Act of March 2, 1929 (45 Stat. 1512; 8 U.S.C. 106(a)) took effect * * *, and so we held that he could not be admitted to citizenship on his pending petition, since he could not show that he had in fact been admitted for permanent residence as the statute required * * *. Proof of residence that may, perhaps, become permanent because this alien was not deportable * * * is certainly not the same as proof of his *lawful entry for permanent residence*.” (Italics ours.)

It is clear that the nature of the alien's entry must be assessed in the light of the immigration laws.³⁴ Although regarded as a “permanent resident” of

³²*In re Weig*, 30 F.(2d) 418; *U. S. v. Beda*, 118 F.(2d) 458; also as seamen, *U. S. v. Kreticos*, 40 F.(2d) 1020; *Fanfariotis v. U. S.*, 63 F.(2d) 352; *In re Jensen*, 11 F.(2d) 414; *In re Olson*, 18 F.(2d) 425.

³³*Sadi v. U. S.* (CCA-2nd), 48 F.(2d) 1040 (Cert. denied 284 U.S. 643); *Stapf v. Corsi*, 287 U.S. 129, 53 S.Ct. 40, 77 L.Ed. 215.

³⁴*Werblow v. U. S.*, 134 F.(2d) 791.

the Virgin Islands by reason of regulations under the immigration laws, an alien who could not establish his original entry by a certificate of arrival from the registry of the arrival of aliens in the Virgin Islands was held not to be entitled to naturalization. The Court³⁵ pointed out that it was not until March 31, 1938, that the Solicitor of the Department of Labor ruled that both the Immigration Acts of 1917 and 1924 were applicable to the Virgin Islands and were enforceable by the Immigration and Naturalization Service. On July 1, 1938, under the above ruling, the Immigration and Naturalization Service assumed responsibility for the enforcement of the immigration laws in the Virgin Islands. Under a regulation promulgated by the Commissioner of the Immigration and Naturalization Service, upon the re-entry of an alien, resident of the Islands prior to July 1, 1938, he was to be regarded as presumed to have been lawfully admitted for permanent residence even though no record of his original admission existed, and under the regulation was required to be recorded as a lawful resident alien returning from a temporary absence. The certificates of arrival in these cases were based upon records created under this regulation upon a reentry after July 1, 1938. Applying the general rule by which "residence" or "domicile" may be established clearly, these aliens were "resident" or "domiciled aliens" of the Virgin Islands and although they may remain there indefinitely, they were held not to be eligible for naturalization because the start-

³⁵*In re Sinmiolkjier*, 71 F.Supp. 553 (D.C.) Virgin Islands, 1947.

ing point of their residence for naturalization purposes could not in fact be evidenced by a certificate of arrival made up from a registry showing their original admission to have been for lawful permanent residence within the meaning of the Nationality Act of 1940.³⁶

The requirement that only a certification from the registry of entries of aliens certifying to the admission of the alien for lawful permanent residence will be a proper foundation for a petition for naturalization is a basic longstanding principle of the naturalization laws of this country.³⁷

The certificate of arrival in the present case does not certify that appellee was admitted for lawful permanent residence, but rather it certifies only that according to the registry of his entry appellee was:

“lawfully admitted to the United States of America as the son of a merchant under Section (3) (6) of the Immigration Act of 1924.” (Rec. 7.) (Italics ours.)

“ * * I Further Certify that this certificate of arrival is issued under authority of, and in conformity with, the provisions of the Nationality Act of 1940 (54 Stat. 1137), solely for the use of the alien herein named and only for naturalization purposes.”*

The mere fact that the Courts have found in some Chinese merchant cases that their residence was not subject to any time limitation or that they were not

³⁶Secs. 328(a) and 329(a) Nationality Act of 1940, footnote 22.

³⁷See footnote 18 for historical background.

deportable falls far short of holding that the starting point of their residence met the prerequisite of an entry of an alien upon which a certification from the registry of the record of arrival could be made that they were admitted for lawful permanent residence within the meaning of the naturalization laws. *Such a determination would be completely foreign to the legislative design.* It would result in the sanctioning of naturalization of aliens admitted as “accredited officials of a foreign government” under Section 3(1) of the Immigration Act of 1924; also aliens admitted as a functionary of an international organization under Section 3(7) of the same act, as amended by the Act of December 29, 1945, Public Law 291, 79th Congress, First Session; or an alien admitted as a treaty trader under Section 3(6) of the same statute because in none of these three classes does the law set a time limitation. The period of their residence is unlimited *provided the particular status under which classified by the immigration statutes is maintained.*

Treaty merchants admitted to the United States after June 30, 1924, are not classed as permanent residents. They may be deported for failing to maintain their status as treaty merchants.³⁸

The wife and children of a treaty merchant, if they were admitted on the basis of their relationship, would be deportable with him if he failed to maintain his status as a merchant.³⁹

³⁸*Yim v. U. S.* (C.C.A.-8th—1935), 78 F.(2d) 43.

³⁹*Koga v. Berkshire* (C.C.A.-9th—1935), 75 F.(2d) 820.

In enacting Section 3(6) of the Immigration Act of 1924 (8 U.S.C. 203(6)) Congress did not seek to nullify existing treaties. On the contrary, the legislative history indicates that Section 3(6) was designed to safeguard treaty obligations. (House Rep. 350, 68th Congress, 1st Session.) But in limiting the terms of admission Congress actually was effectuating the purpose of the treaties, *which sought merely to enable nationals of the contracting nations to enter for the purpose of trade, and not for permanent settlement. Congress, in the Immigration Act of 1924, therefore, deliberately excluded the treaty merchants from its designation of immigrants—those coming for permanent residence; and listed them with the non-immigrants—whose sojourn was limited in period or purpose.*

ADMISSION AFTER THE IMMIGRATION ACT OF 1924 OF THE MINOR SON OF A CHINESE MERCHANT, ADMITTED PRIOR TO THAT ACT, DOES NOT CONSTITUTE LAWFUL PERMANENT RESIDENCE FOR NATURALIZATION PURPOSES.

In the instant case, the lower Court seems to have based its decision on the cases of *Haff, Commissioner, v. Yung Poy*, 9th Cir., 68 Fed. (2d) 203, *In re Chi Yan Cham Louie*, 70 Fed. Supp. 493 (appeal dismissed, 9th Cir., 166 Fed. (2d) 15) and *Petition of Wong Choon Hoi*, 71 Fed. Supp. 160 (appeal dismissed 9th Cir. 164 Fed. (2d) 699.)

It will be noted that the two last mentioned cases were dismissed not on the merits, but solely on the ground that the proper party appellant was not men-

tioned therein, indicating that the United States of America should have been the proper appellant in each case.

The Court made the following observations in *In re Pezzi* (Cal. 1928) 29 F. (2d) 999, where Mrs. Pezzi, an applicant for naturalization, originally entered the United States as a visitor in 1925 and in 1926 applied for and was granted a change in her status and was registered as the wife of an Italian treaty merchant:

“Has the petitioner here met the requirements of the law: I think not. The petitioner has no status in the United States other than being the wife of her husband. Her husband’s status is defined by the provisions of Section 3 of the Quota Act of 1924 and the treaty of commerce and navigation between the United States and Italy of 1871 (17 Stat. 845). This treaty defines the status of ‘Italian citizens in the United States and citizens of the United States in Italy.’ Article 1. It clearly contemplates the temporary stay of the merchants of one country in the territory of the other. It accentuates the fact that the citizen of the one country is entitled to certain rights and privileges in the other country, including the privilege of being accompanied by wife, minor children, servants, etc., solely and wholly because such citizen of one country is in the other country temporarily and for no other purpose than to carry on trade. There is not the slightest thought involved in the language of the treaty that the citizen of one country, residing in the other country as a treaty merchant, is laying the foundation for becoming a citizen of the other. Everything in the treaty negatives that thought.

Neither the petitioner nor her husband could have been admitted, under the credentials they carried, as immigrants or as persons coming for the purpose of permanently residing in the United States. They were admitted specifically as nonimmigrant aliens, and specifically under the language of the Quota Law of 1924, as 'aliens entitled to enter * * * solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.' 8 USCA Sec. 203. The word 'solely' there means exactly what it says."

The case of *Cheung Sum Shee v. Nagle* (1925), 268 U.S. 336, arose because Section 3(6) of the Immigration Act of 1924 (8 U.S.C. 203(6)) originally made no provision for the wife and children of a treaty merchant. Soon after the effective date of the 1924 Act, the Supreme Court was called upon to determine whether the wife and children of a merchant could enter the United States. The issue was resolved affirmatively. After considering the provisions of the Immigration Act of 1924 and the terms of the 1880 Treaty with China, the Court said:

"An alien entitled to enter the United States 'solely to carry on trade' under an existing treaty of commerce and navigation *is not an immigrant within the meaning of the Act* (Sec. 3(6)), and therefore is not absolutely excluded by Sec. 13. (Italics ours.)

"The wives and minor children of resident Chinese merchants were guaranteed the right of entry by the treaty of 1880 and certainly possessed it prior to July 1, when the present Immigration Act became effective. *United States v.*

Mrs. Gue Lim, (1900) 176 U.S. 459. That act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioners from entry.

“In a certain sense it is true that petitioners did not come ‘solely to carry on trade.’ But *Mrs. Gue Lim* did not come as a ‘merchant’. She was nevertheless allowed to enter, upon the theory that a treaty provision admitting merchants by necessary implication extended to their wives and minor children. This rule was not unknown to Congress when considering the Act now before us.

“Nor do we think the language of Sec. 5 (Act 5-26-24, 8 USC 205) is sufficient to defeat the rights which petitioners had under the treaty. In a very definite sense they are specified by the Act itself as non-immigrants. They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by this Court twenty-five years ago.”

There is nothing in the Supreme Court decision to warrant an assumption that her admission was for permanent residence.

On the contrary the quoted excerpt indicates quite decisively that the Court found *Mrs. Cheung Sum Shee* and her associates to be non-immigrants within the description of the 1924 Act. The Court twice referred to the language of Section 3(6) authorizing the admission of persons coming solely to carry on trade under existing treaties. The decision interpreted

that language as broad enough to include the wife and minor children of the treaty trader, just as it had concluded in the *Gue Lim* case that the term "merchant" in the treaty with China was broad enough to include the merchant's wife and children.

When enacting Section 3(6) of the 1924 Act, in its original form, Congress must have been aware of the construction placed on the Treaty, yet it likewise made no mention of the wife and children of a merchant and by Section 13(c) made excludable all persons racially ineligible to citizenship. The Court found that the omission of the wives and children in Section 3(6) of the 1924 Act in its original form failed to show any "Congressional intent absolutely to exclude" the wives and minor children of Chinese merchants. By Act of July 6, 1932, the sixth subdivision of Section 3 of the 1924 Act was amended to provide for the entry of the wives and unmarried minor children of merchants as non-immigrants. The decision in the *Cheung Sum Shee v. Nagle* case, *supra*, fell far short of holding that the wives and minor children were entitled to admission under a status equivalent to that of an "immigrant" for lawful permanent residence upon which a petition for naturalization could be founded. Insofar as the 1924 Act related to the wives and minor children, the Court in clear and unmistakable language held them not to be admitted as "immigrants," but rather that they were classified as "non-immigrants."

The 1924 Immigration Act by express provision applied to all aliens entering the United States after

its effective date on July 1, 1924, even though admissible under some other law. It provided that

“* * * an alien, although admissible under the provisions of the immigration laws, other than this Act, shall not be admitted to the United States if he is excludable by any provision of this Act.”⁴⁰

Section 13(c) of the 1924 Act excluded from admission as “immigrants” all aliens ineligible to citizenship unless found to be admissible——

“* * * as a nonquota immigrant under the provisions of subdivision (b), (d), or (e) of Section 4 (none of which pertain to the present case), or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) *is not an immigrant as defined in Section 3.*”⁴¹

Being of a race ineligible to citizenship, the wives and minor children were excludable under the 1924 Act if applying for admission as “immigrants” and could only be admitted under the status of a “non-quota immigrant” under Section 4 of the 1924 Act, or as “non-immigrants” under Section 3 of the same Act. The Supreme Court, therefore, concluded that such racially ineligible wives and minor children were excludable as “immigrants”, *but that they were admissible under a derivative status as “non-immigrants”*, as provided in Section 3(6) of the 1924 Act.

⁴⁰(43 Stat. 166; 8 U.S.C. 223). See footnote 6.

⁴¹43 Stat. 154; 8 U.S.C. 203; 43 Stat. 155; 8 U.S.C. 204). See footnote 9.

This Honorable Court in *Haff v. Yung Poy*, 68 F. (2d) 203, did not decide that the minor son in that case (identical with appellee herein) was admitted as an "immigrant" within the meaning of the 1924 Act for lawful permanent residence, such as would meet the requirement of the Nationality Act, nor that his derivative status entitled him to such a classification by reason of the Treaty. The merchant father was not made deportable under the laws enacted prior to 1924 to carry out the Treaty on the grounds of having failed to maintain the status of merchant under which admitted. This Court pointed out the many harsh consequences of requiring the deportation of the wives and minor children, and concluded only that the son was not to be deported because of the abandonment of mercantile status by his merchant father.

THE REPEAL OF THE CHINESE EXCLUSION ACTS DID NOT CONTEMPLATE THAT CHINESE IN THIS COUNTRY UNDER A MERCANTILE STATUS WOULD BECOME ELIGIBLE FOR NATURALIZATION.

In repealing the Chinese Exclusion Acts and making Chinese racially eligible for naturalization,⁴² the Congressional Committees contemplated that such legislation would place those few Chinese that were to be permitted entry on a parity with other racial groups, but not that the legislation would, in any way, change the existing immigration status of Chin-

⁴²Chinese Exclusion Repeal Act of Dec. 17, 1943 (57 Stat. 600; Sec. 303); Natl. Act of 1940; Chap. 344, Sec. 3 (57 Stat. 601; 8 U.S.C. 703).

ese aliens in this country so as to enable greater numbers to meet the requirements for naturalization. In fact, the language of the Senate Committee clearly demonstrates the Committee understood that the greater number of Chinese in this country are ineligible to naturalize because they have not been admitted *for lawful permanent residence which is a condition precedent to naturalization*. Their understanding was expressed in the following language.⁴³

“The number of Chinese who will actually be made eligible for naturalization under this Section is negligible. There are approximately 42,000 alien Chinese persons in the United States, (37,242 in continental United States and 4,844 in Hawaii, according to census figures of 1940). However, *a large number of these Chinese have never been admitted to the United States for lawful residence, which is a condition precedent to naturalization and, therefore many of this number would not be eligible for naturalization*, not because of racial disability, but because they cannot meet existing statutory requirements of law. The number of Chinese who will be made eligible in the future, in addition to those already here, will of necessity be very small because the quota for China is limited to 105 per annum, as provided for in Section 2 of this bill.” (Italics added.)

Section 2 of the Chinese Exclusion Repeal Act of December 17, 1943, limits the number of Chinese who are made admissible under the law for permanent residence to certain aliens classified as “non-quota

⁴³78th Cong., 1st Sess.; Sen Rep. 535, p. 6; House Rep. 732.

immigrants,"⁴⁴ and sets the number of Chinese admissible annually as "immigrants" to be computed under the provisions of Section 11 of the 1924 Act. Under that computation the quota for Chinese is limited to 105 Chinese annually.⁴⁵ The Chinese Exclusion Repeal Act also provides that a preference up to seventy-five per centum of this quota shall be given to Chinese born and resident in China. The remaining twenty-five per centum would be available for Chinese in other countries or temporarily in the United States who are in a position to apply for pre-examination,⁴⁶ or *other benefits of the immigration laws incident to admission for lawful permanent residence in the United States as "immigrants"*. Under the limitation of twenty-five per cent of the quota available to Chinese who may be admitted to this country from countries other than China, which includes Chinese already in the United States, it follows that only very few of the Chinese already here can be naturalized, and carries out the legislative design and understanding that "*the number who will actually be made eligible for naturalization is negligible*".

The Congressional Committee indicates very clearly that the purpose of the Chinese Exclusion Repeal Act

⁴⁴Sec. 4(b)(d)(e) and (f) (43 Stat. 155; with amendments; 8 U.S.C. 204), except subdivision (e) of Sec. 4 is restricted in period of residence by Sec. 15, Act of 1924, as more fully set out in footnote 9.

⁴⁵Sec. 61.316, Title 22 C.F.R., provides "the following is a list of the annual immigration quotas established for the various quota countries of the world * * * Chinese 105."

⁴⁶Part 142, Title 8 C.F.R.

was not to open wide the doors to Chinese "immigrants".⁴⁷

"The purpose of this section is to repeal all of the laws enacted between 1882 and 1913, dealing with the exclusion and deportation of Chinese persons. It should be stated at this point that no substantial gain accrues to the Chinese people through the repeal of these laws from a standpoint of permitting Chinese to enter the country who are at present denied that privilege because other provisions of laws subsequently enacted effectively keep out persons of the Chinese race as well as persons of other races ineligible to citizenship. *It does, however, eliminate the undesirable laws specifically designating Chinese as a race to be excluded from admission to the United States.*" (Italics added.)

President Roosevelt, in his message to Congress October 11, 1943, regarding the Chinese Exclusion Repeal Act, stated:⁴⁸

"By the repeal of the Chinese exclusion laws, we can correct a historic mistake and silence the distorted Japanese propaganda. The enactment of legislation now pending before the Congress would put Chinese immigrants on a parity with those from other countries. The Chinese quota, would, therefore, be only about 100 immigrants a year. There can be no reasonable apprehension that any such number of immigrants will cause unemployment or provide competition in the search for jobs. The extension of the privileges of citizenship to the relatively few Chinese resi-

⁴⁷See footnotes 16 and 17.

⁴⁸Sen. Rep. 535, p. 3, 78th Congress, First Session.

dents in our country would operate as another meaningful display of friendship.”

The foregoing quotations from the Congressional Committee reports are a public recognition that all the prior laws dealing with Chinese were laws of “exclusion” and not admission, designed for the purpose of preventing an influx of Chinese immigration into the United States, and that the privilege granted by Article II of the Treaty of 1880 to special classes named therein, including merchants, “to go and come of their own free will and accord” was a special privilege granted to a preferred class for commercial purposes only. The Treaty contained no definition of the term “merchant”, nor did it provide any particular procedure for his coming and going. It was not until the Act of November 3, 1893, enacted in pursuance of the Treaty, that the term “merchant” was defined.⁴⁹ That definition requires that he maintain his mercantile activities in order to retain the status under that Act and the Treaty, of “merchant”. By this definition he was required to engage in buying and selling merchandise, and to have a fixed place of business, and during the time he claimed to be so engaged was not to perform any manual labor except such as was necessary in the conduct of his business as a merchant.

Section 2 of the same Act in defining a “domiciled merchant” signifies in clear language a Congressional intent that admission of a Chinese as a merchant under this law was not to constitute an admission for

⁴⁹See footnote 4.

unrestricted, lawful, permanent residence such as would form the foundation for a petition for naturalization.⁵⁰ It was provided that:

“Where an application is made by a Chinaman for entering into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two creditable witnesses, other than Chinese, the fact that he conducted such business, as hereinbefore defined, for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor excepting such as was necessary in the conduct of his business as such merchant, *and in default of such proof shall be refused landing.*” (Italics added.)

A study of the history of the treaties and the legislation effectuating the treaty stipulations dispels any contention that it was ever intended or contemplated that Chinese were to be admitted into the United States as permanent settlers to become a part of the body politic of this country.

At the outset, Congress prohibited the naturalization of any Chinese who might then be in the United States.⁵¹ Moreover, by Article IV of a Convention Regulating Chinese Immigration concluded March 17, 1894, it was provided that:

“In pursuance of Article III of the Immigration Treaty * * * signed * * * the 17th day of

⁵⁰(28 Stat. L. 7).

⁵¹Act approved May 6, 1882, providing, “That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.” (22 Stat. 61; 8 U.S.C. 363).

November, 1880 * * * it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens.* * * *”
(Italics added.)

All Chinese other than the specified exempt classes were excluded from admission, and if found in the United States were made deportable⁵² unless such Chinese had complied with the law requiring registration of all Chinese laborers within the United States during the registration period.⁵³ The character of the immigration status with which a merchant was clothed who had been admitted to the United States prior to the Immigration Act of 1924, is shown in a decision of the Supreme Court, involving the admissibility of the wife and minor children upon their arrival at a port in the United States in 1917. The mercantile status under which the husband-father was admitted to the United States in 1901 had terminated and he was found to be a laundryman at the time of their application. The Court concluded that the husband-father although himself admitted under mercantile status, no longer had an immigration status entitling his wife and minor children to admission in

⁵²Sec. 13, Act of Sept. 13, 1880 (25 Stat. 476, 477); Sec. 2, Act of May 5, 1892 (27 Stat. 25); Sec. 3, Act of Mar. 3, 1901 (31 Stat. 1093).

⁵³Act of May 5, 1892, as amended by the Act of Nov. 3, 1893 (28 Stat. 7).

the United States.⁵⁴ Although a Chinese admitted as a merchant prior to 1924 was held not to be subject to deportation because of subsequent abandonment of status, if he left the United States temporarily it was necessary for him to establish a mercantile status each time he reentered the United States. He was not, however, limited in the establishing of such mercantile status to presentation of a section six certificate issued by his own government attesting to his mercantile status in the same manner as on original entry.⁵⁵

From the foregoing judicial interpretations and reference to the history of the treaties and legislation preceding the enactment of the 1924 Immigration Act, it is readily understandable that the Supreme Court would hold that the admission of the wives and minor children after the 1924 Act, under the existing status of a Chinese admitted as a merchant prior to the said Act, was not as "immigrants" or "nonquota immigrants" as those terms are used in the 1924 Act which terms define the only classes of aliens admitted for lawful unrestricted permanent residence, but rather found their admissions to be authorized as "non-immigrants", the term used in the 1924 Act to cover all classes of aliens whose admissions are for a period of time to be determined

⁵⁴*Yee Won v. White*, 256 U.S. 399, 41 S.Ct. 504, 65 L.Ed. 1012; *Chung Yim v. U. S.*, 78 F.(2d) 43.

⁵⁵*Lau Ow Bew v. U. S.*, 144 U.S. 47, 12 S.Ct. 517, 36 L.Ed. 340; *U. S. v. Wong You*, 223 U.S. 67, 32 S.Ct. 195, 56 L.Ed. 354. Mr. Justice Holmes, in referring to the Exclusion Acts, states: "The existence of the earlier laws only indicates the special solicitude of the government to limit the entrance of Chinese."

upon a continuous maintenance of status or a period specified at time of admission, but not for lawful unrestricted permanent residence as to time or purpose.

All aliens, including Chinese who did not have an unrestricted permanent immigration status, and who entered the United States prior to the 1924 Act and who were not deportable under that Act, may have their entries or residence legalized, and a registry made of their entries when so created meets the requirement of the Nationality Act of 1940. A certification from such a registry of the alien's entry showing admission for lawful permanent residence meets that essential prerequisite to a grant of citizenship. The Nationality Act provides:⁵⁶

“(c) For the purpose of the immigration laws *and the naturalization laws* an alien, in respect of whom a record of registry has been made as authorized by this section, *shall be deemed to have been lawfully admitted to the United States for permanent residence* as of the date of such alien's entry.” (Italics added.)

CONCLUSION.

The order naturalizing the appellee was erroneously granted. Since appellee failed to establish his admission for lawful permanent residence, as required by the Naturalization laws, he was not eligible for citizenship.

⁵⁶Secs. 328(b) and (c), Nationality Act of 1940 (54 Stat. 1151-1152; 8 U.S.C. 728).

It is respectfully submitted, therefore, that the judgment and order of the District Court, admitting him to citizenship, should be reversed.

Dated, San Francisco, California,
June 20, 1949.

Respectfully submitted,

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No. 12226

United States
Court of Appeals
for the Ninth Circuit

HELEN YOUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED

MAY 13 1960

PAUL P. O'BRIEN,

No. 12226

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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* Page numbering appearing at foot of page of original certified Reporter's Transcript.

In the District Court of the United States in and
for the Southern District of California, Central
Division

September, 1948, Term

No. 20329

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HELEN YOUNG and EDYTHE L. FOXALL,

Defendants.

INDICTMENT

[U.S.C., Title 18, Sec. 88; U.S.C., Title 38, Secs.
697 and 715—Conspiracy to Defraud; Causing
False Statements Concerning a Claim for Bene-
fits.]

The grand jury charges:

COUNT ONE

[U.S.C., Title 18, Sec. 88]

Prior to March 1, 1946, and continuing there-
after to on or about the date of the return of this
indictment, within the Central Division of the
Southern District of California, defendants, Helen
Young and Edythe L. Foxall, did conspire and
agree together and with others to the grand jury
unknown to defraud the United States; namely, to
impair and obstruct the functioning of the Vet-
erans Administration, an agency of the United
States, by causing said agency to guarantee on.

behalf of the Government of the United States loans to veterans for purchasing property and constructing dwellings thereon to be occupied as their homes, in cases where such veterans were paying amounts for such property and such construction that exceeded the reasonable value thereof, as determined by proper appraisals made by appraisers designated by the Administrator of Veterans Affairs, contrary to public policy as expressed in the Servicemen's Readjustment Act of 1944 (38 U.S.C., 694, et seq.), and the Regulations issued thereunder.

It was a part of said conspiracy that the objects thereof would be accomplished as follows: [2]

Defendants would hold themselves out as real estate agents and contractors; would sell lots of their own and of others to veterans of World War II and would contract to build houses for veterans, such purchases and construction to be financed by loans guaranteed by the Government of the United States under the Servicemen's Readjustment Act of 1944; would execute and submit to the lending institutions that were to make the loans to the veterans, escrow instructions, contracts and similar papers, from which it would appear that the lots were being sold to veterans at or below the reasonable value of such lots as determined by appraisers designated by the Administrator of Veterans' Affairs and that the houses were being constructed at firm prices, which also did not exceed such reasonable values; and would cause the lending institutions in applying to the Veterans Ad-

ministration for guarantees of the loans to purchase such lots and to build such houses to certify that the amounts so reported by defendants were the amounts to be paid by the veterans and did not exceed such reasonable values; but defendants would require such veterans to make cash payments for the lots in excess of the sales prices reported to the lending institutions and would conceal from the lending institution and the Veterans Administration the existence of contracts to pay prices over such reasonable values of said lots, and the fact of such overpayments; and at or about the same time that the construction contracts containing the firm price were submitted to the lending institution, defendants would cause the veterans to execute new construction contracts to pay cost plus ten per cent, said cost not to be below a minimum figure at or slightly below the Veterans Administration appraisal, and not to exceed a maximum figure well over such appraisal, which contract would be concealed from the lending institution and the Veterans Administration; and defendants would demand of said veterans not only the maximum costs fixed in such contracts but also additional amounts for extras.

To effect the objects of said conspiracy, defendants committed divers overt acts in the Central Division of the Southern District of California, among which are the following:

(1) On or about May 14, 1946, defendant Helen Young gave a receipt to William O. Given for \$700.00, as deposit on Lot 99, Tract 9974, 10819

Barman [3] Avenue, Culver City, California, showing the total price to be \$2,200.00;

(2) On or about May 14, 1946, defendant Edythe L. Foxall signed Escrow Instructions showing the purchase price of the lot at 10819 Barman Avenue to be \$1,500.00, to be paid by William O. Given and Jean F. Given;

(3) On or about May 9, 1946, defendant Helen Young signed a contract to construct a house on Lot 98 of Tract 9974, for Lloyd Shearer and Marva P. Shearer, for \$8,171.00.

(4) On or about May 9, 1946, defendant Helen Young caused Lloyd Shearer and Marva P. Shearer to sign a building construction contract by which a dwelling was to be constructed by the defendant on a cost plus ten per cent basis, with a minimum cost figure of \$8,200.00 and a maximum cost figure of \$9,000.00. [4]

COUNT TWO

[U.S.C., Title 38, Secs. 697 and 715]

On or about July 1, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Helen Young and Edythe L. Foxall did knowingly cause a false certificate to be made concerning a claim for benefits under the Servicemen's Readjustment Act of 1944 (38 U.S.C., Sections 694, et seq.); in that defendants did inform the Culver City Branch No. 366 of the Bank of America National Trust and Savings Association that the amount to be paid by Lloyd Shearer, a veteran of World War II,

to purchase a lot and construct a house at 10813 Barman Avenue, Culver City, California, as to which a loan guarantee was being sought from the Government of the United States, was \$9671.00, being made up of \$1500.00 to purchase said lot and \$8171.00 to construct such house, and did cause said bank to certify in a Home Loan Report presented to the United States Veterans Administration that the amount to be paid by such veteran to purchase such lot and to construct such house was \$9671.00 and did not exceed the reasonable value thereof of \$9700.00, as determined by a proper appraisal dated May 3, 1946, made by Harrison H. Crawford, an appraiser designated by the Administrator of Veterans' Affairs; whereas, as defendants well knew and caused to be concealed from said bank and the Veterans Administration, defendants had caused said veteran to sign a contract to pay \$2200.00 for such lot, and had caused said veteran to sign a contract to pay cost plus 10 per cent, with a minimum cost figure of \$8200.00 and a maximum cost figure of \$9000.00 for the construction of such house, and did demand from said veteran the sum of \$9000.00 for such construction, or a total of \$11,200.00 for such house and lot. [5]

COUNT THREE

[U.S.C., Title 38, Secs. 697 and 715]

On or about June 15, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Helen Young and Edythe L. Foxall did knowingly cause a false

certificate to be made concerning a claim for benefits under the Servicemen's Readjustment Act of 1944 (38 U.S.C., Sections 694, et seq.), in that defendants did inform the Culver City Branch No. 366 of the Bank of America National Trust and Savings Association that the amount to be paid by William O. Given, a veteran of World War II, to purchase a lot and construct a house at 10819 Barman Avenue, Culver City, California, as to which a loan guarantee was being sought from the Government of the United States, was \$9800.00, being made up of \$1500.00 to purchase said lot and \$8300.00 to construct such house, and did cause said bank to certify in a Home Loan Report presented to the United States Veterans Administration that the amount to be paid by such veteran to purchase such lot and to construct such house was \$9800.00 and did not exceed the reasonable value thereof of \$9800.00, as determined by a proper appraisal dated April 26, 1946, made by Harrison H. Crawford, an appraiser designated by the Administrator of Veterans' Affairs, whereas, as defendants well knew and caused to be concealed from said bank and the Veterans Administration, said defendants had demanded and did receive from said veteran the sum of \$2200.00 for such lot and had caused said veteran to sign a contract to pay cost plus 10 per cent, with a minimum cost figure of \$8200.00 and a maximum cost figure of \$9000.00, for the construction of such house, and did demand from said veteran the sum of \$9000.00 for such construction, or a total of \$11,200.00 for such house and lot. [6]

COUNT FOUR

[U.S.C., Title 38, Secs. 697 and 715]

On or about August 1, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Helen Young did knowingly cause a false certificate to be made concerning a claim for benefits under the Servicemen's Readjustment Act of 1944 (38 U.S.C., Sections 694, et seq.), in that defendant did inform the Culver City Branch No. 366 of the Bank of America National Trust and Savings Association that the amount to be paid by Louis J. Gablick, a veteran of World War II, to purchase a lot and construct a house at 5117 Fairbanks Way, Culver City, California, as to which a loan guarantee was being sought from the Government of the United States, was \$9800.00, being made up of \$1300.00 to purchase said lot and \$8500.00 to construct such house, and did cause said bank to certify in a Home Loan Report presented to the United States Veterans Administration that the amount to be paid by such veteran to purchase such lot and to construct such house was \$9800.00, and did not exceed the reasonable value thereof of \$9800.00, as determined by a proper appraisal dated April 22, 1946, made by Harrison H. Crawford, an appraiser designated by the Administrator of Veterans' Affairs, whereas, as defendant well knew and caused to be concealed from said bank and the Veterans Administration, defendant had caused said veteran to sign a contract to pay \$1650.00 for such lot and caused said vet-

eran to sign a contract to pay cost plus 10 per cent, with a maximum cost figure of \$8200.00 and a maximum cost figure of \$9000.0, for the construction of such house, and did demand from said veteran the sum of \$9000.00 for such construction, or a total of \$10,650.00 for such house and lot. [7]

COUNT FIVE

[U.S.C., Title 38, Secs. 697 and 715]

On or about July 1, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Helen Young did knowingly cause a false certificate to be made concerning a claim for benefits under the Servicemen's Readjustment Act of 1944 (38 U.S.C., Sections 694, et seq.); in that defendant did inform the Culver City Branch No. 366 of the Bank of America National Trust and Savings Association that the amount to be paid by William J. Hampton, a veteran of World War II, to construct a house at 10762 Braddock Drive, Culver City, California, as to which a loan guarantee was being sought from the Government of the United States, was **\$8283.00**, which, added to the \$1500.00 that the veteran was paying to purchase the lot, made a total of \$9783.00 to purchase said lot and construct said house, and did cause said bank to certify in a Home Loan Report presented to the United States Veterans Administration that the amount to be paid by such veteran to purchase such lot and to construct such house was \$9783.00 and did not exceed the reasonable value thereof of \$9800.00, as determined by

a proper appraisal dated April 23, 1946, made by Harrison H. Crawford, an appraiser designated by the Administrator of Veterans' Affairs; whereas, as defendant well knew and caused to be concealed from said bank and the Veteran Administration, defendant did cause said veteran to sign a contract to pay cost plus 10 per cent, with a minimum cost figure of \$8200.00 and a maximum cost figure of \$9000.00, for the construction of such house, and did demand from said veteran the sum of \$9000.00 for such construction, or a total of \$10,500.00 for such house and lot. [8]

COUNT SIX

[U.S.C., Title 38, Secs. 697 and 715]

On or about July 1, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Helen Young did knowingly cause a false certificate to be made concerning a claim for benefits under the Servicemen's Readjustment Act of 1944 (38 U.S.C., Sections 694, et seq.); in that defendant did inform the Culver City Branch No. 366 of the Bank of America National Trust and Savings Association that the amount to be paid by Thomas F. Carroll, a veteran of World War II, to construct a house at 10723 Franklin Avenue, Culver City, California, as to which a loan guarantee was being sought from the Government of the United States, was \$8200.00, which, added to the \$1800.00 that the veteran was paying to purchase the lot, made a total of \$10,000.00 to purchase said lot and construct

said house, and did cause said bank to certify in a Home Loan Report presented to the United States Veterans Administration that the amount to be paid by such veteran to purchase such lot and to construct such house was \$10,000.00 and did not exceed the reasonable value thereof of \$10,000.00, as determined by a proper appraisal dated April 8, 1946, made by Harrison H. Crawford, an appraiser designated by the Administrator of Veterans' Affairs; whereas, as defendant well **knew and caused** to be concealed from said bank and the Veterans Administration, defendant did cause said veteran to sign a contract to pay cost plus 10 per cent, with a minimum cost figure of \$8200.00 and a maximum cost figure of \$9500.00, for the construction of such house, and did demand from said veteran the sum of \$9500.00 for such construction, or a total of \$11,300.00 for such house and lot.

A True Bill.

/s/ C. B. AHLSEDE,
Foreman.

/s/ JAMES M. CARTER,
United States Attorney.

[Endorsed]: Filed Oct. 6, 1948. [9]

[Title of District Court and Cause.]

BILL OF PARTICULARS

Comes Now the United States of America, the plaintiff in the above entitled cause, and in response

to defendants' Demand For Bill Of Particulars, states as follows:

The following are the statutes concerning loans guaranteed by the Government which are involved in the indictment in the above matter:

Sections 500 (38 U.S.C. 694), 501 (38 U.S.C. 694a), 504 (38 U.S.C. 694 d), and 1500 (38 U.S.C. 697), of the Servicemen's Readjustment Act of 1944; and

Section 15 of the Act of March 20, 1933 (38 U.S.C. 715).

Dated this 29th day of October, 1948.

JAMES M. CARTER,
United States Attorney.

/s/ PAUL FITTING,
Assistant U. S. Attorney.

[Endorsed]: Filed Nov. 1, 1948. [10]

[Title of District Court and Cause.]

MOTION TO DISMISS THE INDICTMENT AND THE SEVERAL COUNTS THEREOF

These defendants, Helen Young and Edythe L. Foxall, severally move that the indictment herein, and each and every count thereof severally, be dismissed, upon the following grounds:

That the indictment does not state facts sufficient to constitute an offense against the United States, and that each count thereof fails to state

facts sufficient to constitute an offense or offenses against the United States.

/s/ HAL HUGHES,
Attorney for Defendants Helen Young and Edythe
L. Foxall.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Nov. 5, 1948. [11]

At a stated term, to wit: The September Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday, the 5th day of January, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Peirson M. Hall, District Judge.

[Title of Cause.]

For hearing on motion of defendants to dismiss, pursuant to notice thereof filed Nov. 5, 1948; Paul Fitting, Ass't U. S. Att'y, appearing as counsel for Gov't; Hal Hughes, Esq., appearing as counsel for defendants, who are both present on O/R;

Attorney Hughes argues in support of motion to dismiss, and Attorney Fitting argues in reply. Court orders said motion to dismiss denied.

Reading of Indictment is waived and each de-

defendant pleads not guilty to each of the six counts of the Indictment.

Court orders cause set for trial Feb. 15, 1949, 10 a.m., before Judge Mathes. [25]

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find the defendant, Helen Young, not guilty as charged in the First Count of the indictment and guilty as charged in the Second Count of the indictment; and guilty as charged in the Third Count of the indictment; and guilty as charged in the Fourth Count of the indictment; and guilty as charged in the Fifth Count of the indictment; and [26] guilty as charged in the Sixth Count of the indictment.

Los Angeles, California, March 3rd, 1949.

/s/ R. W. BRAZELTON,
Foreman of the Jury.

[Endorsed]: Filed March 3, 1949. [27]

District Court of the United States for the Southern
District of California, Central Division

No. 20329—Criminal

UNITED STATES OF AMERICA,

vs.

HELEN YOUNG.

JUDGMENT AND PROBATIONARY ORDER

Indictment (6 Counts—Violation 38 U.S.C., §§ 697
and 715—18 U.S.C., § 88)

On this 28th day of March, 1949, came the attorney for the government and the defendant appeared in person and with her attorney, Hal Hughes, Esquire.

It Is Adjudged that the defendant has been convicted upon her plea of not guilty on all counts and verdict of guilty on Counts Two, Three, Four, Five and Six [Not Guilty on Count One] of the offenses of having on June 15, 1946, July 1, 1946, August 1, 1946, caused false certificates to be made by the Bank of America stating that the amount to be paid for the houses and lots described did not exceed the reasonable value thereof as determined by a proper appraisal made by a designated appraiser of the Administrator of Veterans' Affairs, as charged in Counts Two, Three, Four, Five, and Six of the indictment; and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and

no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year in an institution to be selected by the Attorney General of the United States or his authorized representative, and pay to the United States of America a fine of \$1,000 for the offense charged in the Second Count of the indictment; and be further imprisoned for a period of one year and pay a fine of \$1,000 for the offense charged in the Third Count of the indictment; and be further imprisoned for a period of one year and pay a fine of \$1,000 for the offense charged in the Fourth Count of the indictment; and be further imprisoned for a period of one year and pay a fine of \$1,000 for the offense charged in the Fifth Count of the indictment; and be further imprisoned for a period of one year and pay a fine of \$1,000 for the offense charged in the Sixth Count of the indictment; and be further imprisoned until said fines are paid or she is otherwise discharged as provided by law.

It Is Further Adjudged that the periods of imprisonment imposed under Counts Two, Three, Four, Five and Six of the indictment shall commence and run concurrently.

It Is Further Adjudged that execution of the sentences hereinabove imposed for the offenses charged in Counts Two, Three, Four, Five and Six be and is hereby suspended and the defendant is placed on probation for the period of five years

commencing forthwith; and the conditions of probation are fixed as follows: during the probationary period the defendant shall (1) make full restitution of \$3,200, such restitution to be made at such times and in such installments as the Probation Officer of this Court shall direct, the proceeds of such restitution to be applied to reduce the loans of the veterans involved, as follows:

Name of Veteran	Amount of Restitution
Lloyd Shearer.....	\$ 700.00
Wm. O. Given.....	700.00
Thos. F. Carroll.....	1,300.00
David Hamilton.....	500.00; and

(2) Pay to the United States of America a fine of \$2,000, such fine to be paid at such times and in such installments as the Probation Officer of this Court shall direct; (3) obey all laws applicable to her conduct, wherever she may be; and (4) comply with all rules which the Probation Officer of this Court shall prescribe for the guidance of her personal conduct.

It Is Further Adjudged that the probationary periods and the conditions of probation shall be the same as to Counts Two, Three, Four, Five and Six of the indictment; that the probationary periods shall commence and run concurrently; that compliance with the conditions of probation as to Count Two of the indictment shall also constitute compliance with the conditions of probation as to Counts Three, Four, Five and Six; and that a violation of any of the conditions of probation as to

Count Two shall likewise constitute a violation of the conditions of probation as to Counts Three, Four, Five and Six.

It Is Further Adjudged that the defendant be discharged from the custody of the United States Marshal forthwith and that her bail be exonerated.

It Is Adjudged that the defendant is not guilty of the offense charged in Count One of the indictment.

Filed March 28, 1949.

/s/ WM. C. MATHES,

United States District Judge.

EDMUND L. SMITH,

Clerk.

By /s/ LOUIS J. SOMERS,

Deputy Clerk. [28]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above-Entitled Honorable Court:

Please Take Notice that the defendant in the above-entitled matter hereby appeals to the Ninth United States Circuit Court of Appeals, from the judgment and sentence heretofore imposed upon her in the above-entitled case, and from the whole thereof, and in connection with taking such appeal makes the following representations:

1. That the attorney who will represent her in connection with said appeal is Hal Hughes,

whose business address is Room 615 Broadway Arcade Building, Los Angeles 13, California.

2. That the address of defendant and appellant is 10054 Culver Boulevard, Culver City, California.

3. That the offense of which appellant has been convicted in the above-entitled matter is a violation of Secs. 694a, 697 and 715, all of Title 38 U.S.C., commonly known as the G. I. Bill of Rights. [29]

4. The judgment of the court after conviction herein upon five counts numbered 2 to 6 of the above numbered indictment was rendered on the 28th day of March, 1949, and the defendant was sentenced as follows:

Counts	Imprisonment	Fine
2	1 year	\$1000.00
3	1 year	1000.00
4	1 year	1000.00
5	1 year	1000.00
6	1 year	1000.00

All sentences to run concurrently. Such sentences were suspended, however, and defendant was placed upon probation for a term of five years, upon the following conditions:

(a) That she make restitution either in the form of credit upon unpaid balances sought to be collected by her, or, if there be no such unpaid balances then by paying the same to the credit of the Veteran upon his loan which is guaranteed by the Government, in the total sum of \$3200.00, distributed as follows: As to the Veteran Shearer \$700; as to the Veteran Given \$700; as to the Vet-

eran Carroll \$1300; and as to the Veteran Hamilton \$500.

(b) That she pay a fine of \$2000; that she obey all the laws of the land and all rules laid down for her conduct by the Probation Department of the Department of Justice.

5. The defendant is not in custody.

/s/ HAL HUGHES,

Attorney for Appellant
Helen Young.

[Endorsed]: Filed March 29, 1949. [30]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To Edmund L. Smith, Clerk of the Above-Entitled Court:

The Defendant and Appellant, Helen Young, in the above-entitled matter, and on to wit, the 29th day of March, 1949, filed Notice of Appeal herein unto the Ninth United States Circuit Court of Appeals, and with a view to perfecting such appeal, designates to you the said Clerk the following documents and papers and copies of portions of the reporter's transcript, all of which said documents, papers and copies are a portion of your records in the above-entitled case:

1. The indictment.
2. The Bill of Particulars.

3. The Motion to Dismiss.
4. The Order denying the motion to dismiss.
5. Defendant's Motion for Judgment of Acquittal made at the close of the Government's testimony. [31]
6. The Order denying the same.
7. The Motion for Judgment of Acquittal made at the close of all testimony.
8. The Order denying the same.
9. Instruction 13C as given.
10. Defendant's exception thereto.
11. The Court's Order Overruling such Exception to such Instruction 13B.
12. The Verdict as to Helen Young only.
13. The Judgment as to Helen Young only.

Respectfully,

/s/ HAL HUGHES,
Attorney for Defendant and Appellant Helen
Young.

(Acknowledgment of Service.)

[Endorsed]: Filed March 31, 1949. [32]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 33, inclusive, contain the original Indictment; Bill of Particulars; Motion to Dismiss the Indictment and the Several Counts Thereof; Verdict; Judgment and Commitment; Notice of Appeal and Designation of Record on Appeal and a full, true and correct copy of Minute Order Entered January 5, 1949, which, together with copy of reporter's transcript of proceedings on February 25 and March 3, 1949 (partial), transmitted herewith, constitute the record on appeal of Helen Young to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 14th day of April, A.D. 1949.

[Seal]

EDMUND L. SMITH,
Clerk.

In the District Court of the United States in and
for the Southern District of California, Central
Division

Honorable William C. Mathes, Judge Presiding.

No. 20,329-WM-Criminal

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HELEN YOUNG and EDYTHE L. FOXALL,
Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, Friday, February 25, 1949

Appearances: For the Plaintiff—James M. Carter, Esquire, United States Attorney, by Paul Fitting, Esquire, Asst. United States Attorney. For the Defendants: Hal Hughes, Esquire.

MOTION FOR JUDGMENT OF ACQUITTAL
AT CLOSE OF PLAINTIFF'S CASE IN
CHIEF

The Court: Is it stipulated, gentlemen, that the jury have left the room and the defendants remain present, both of them?

Mr. Hughes: Yes, your Honor.

Mr. Fitting: So stipulated.

The Court: You may proceed, Mr. Hughes.

Mr. Hughes: Under Rule 29 of the Rules of Criminal Procedure the defendants and each of them move for a judgment of acquittal as to each

of the counts severally and as to each defendant as to each such count severally on the grounds:

First, that the Counts Two and following of the indictment do not describe an offense against the Government;

On the grounds, second, that the first count seeks to denounce a conspiracy under Section 88 of Title 18 to commit the crime of conspiracy which is denounced, if at all, in Section 715 of Title 38.

And if your Honor will give me a few moments or give me some time, I would like to talk at some length about this.

The Court: I have been through this matter at one time, Mr. Hughes.

Mr. Hughes: I argued this before your Honor at one [2] time myself, but your Honor did not decide it.

The Court: Since then I have had some occasion to consider it. You may proceed. I was referring more particularly to this incorporation by reference to the statute.

Mr. Hughes: That is what I want to talk about, your Honor.

(Argument omitted from transcript.)

The Court: I am going to read those cases again before this case is over, but not before deciding this motion. You may renew your motion upon the conclusion of all the evidence.

(Further discussion omitted from transcript.)

Mr. Hughes: One other matter, but I will have to find my notes. In one of the counts there was no showing of any knowledge on the part of Mrs.

Young—which was the only part of the charge—with the selling of the lot. That was to Hampton, Count Five.

The Court: Yes; I have that in mind.

Mr. Hughes: And I add to my motion that the Count Five be dismissed as to Helen Young, the only defendant therein named, in that the Government has failed to show by all of the evidence it has produced here that she did cause the bank or anyone else to make a false statement to the Government, or that she did cause the Government to be misled as to the total value. If you will recall, the value of her bid would fit well inside the entire loan. There is no [3] showing that she knew what the other item was at all.

The Court: No; there is not. There is not any showing necessarily that she knew that the two items, added together, would exceed the amount of the appraisal; but there is evidence that she made a false statement, gave false information to the bank as to the contract price of the house, and it is a question for the jury, as I view it, as a matter of proof of whether it is shown beyond a reasonable doubt that the defendant Young did cause it to make the false certificate charged.

Does that complete your points?

Mr. Hughes: Yes, your Honor. And, for fear that I did not say it properly in the first place, this motion is made by Helen Young severally as to Counts One, Two, Three, Four, Five, and Six, and as to Edythe Foxall severally as to Counts One, Two, Three, and Four, is it not?

The Court: One, Two, and Three?

Mr. Hughes: One, Two, and Three.

The Court: In other words, the defendant Foxall joins in the motion with respect to each count in which she is named.

Mr. Hughes: Of course, I take it this motion is not joined in but is made severally on behalf of each defendant?

The Court: Yes.

Mr. Hughes: Because your Honor might well grant it [4] as to one and deny it as to another. Such conditions might exist, so I desire my motion be made severally.

The Court: Severally made by each defendant, directed to each count.

Mr. Hughes: To each count in which her name appears. May the record so show?

The Court: The record may so show, and the motions are denied.

Mr. Hughes: Thank your Honor for your patience in having heard me.

The Court: I am going to reconsider this incorporation by reference again. You may renew your motion, of course, at the close of all the evidence.

Mr. Hughes: Before submission to the jury?

The Court: Yes.

Mr. Hughes: Before argument?

The Court: Yes; at the close of all the evidence. In the meantime, as I say, I want to reconsider the question and reread these authorities which you have cited. [5]

Los Angeles, California

Thursday, March 3, 1949, 9:45 A.M.

**MOTION FOR JUDGMENT OF ACQUITTAL
AT CLOSE OF ALL THE TESTIMONY**

The Court: You may proceed. Is it stipulated, gentlemen, that the jury are absent and the defendants are present?

Mr. Hughes: Yes, your Honor.

At this time on behalf of each of the defendants and severally, and as to each of the Counts One, Two, Three, Four, Five, and Six severally, I again move the court that it enter its judgment of acquittal in behalf of each defendant severally as to each count.

In doing so I do not believe that I am justified in repeating any of the discussion which took place heretofore. I think that your Honor heard my argument then, and I hope that your Honor has read the cases that I cited, the new ones, since that time.

(Argument omitted from transcript.)

The Court: I am of the view that it is a question for the jury. The motions for judgment of acquittal are denied. They will be deemed made as to both defendants as to all counts in which each defendant is charged.

Mr. Hughes: And as to each defendant in each count. [7]

INSTRUCTION 13-C

Section 715 of Title 38 of the United States Code provides in part that:

“Any person who shall knowingly make or cause to be made, * * * or in any wise procure the making or presentation of a false * * * certificate * * * concerning any claim for benefits * * *”

under the Servicemen's Readjustment Act of 1944 shall be guilty of an offense.

Mr. Hughes: Under Rule 30, your Honor, I have an objection that I want to make, and I do not know whether your Honor regards this as a premature time to do so. It seems at least a convenient one. It is before the jury has been charged and it is also before argument.

The Court: Yes; you may. You may wish to renew it before the jury has retired. Is this a general objection or to a specific instruction?

Mr. Hughes: To a specific instruction. It ties in with the whole tenor of the whole argument I have been giving. For identification, it is 13-C, which reads as follows:

“Section 715 of Title 38 of the United States Code provides in part that:

‘Any person who shall knowingly make or cause to be made, * * * or in any wise procure the [8] making or presentation of a false * * * certificate * * * concerning any claim for benefits * * *’

under the Servicemen's Readjustment Act of 1944 shall be guilty of an offense.”

I believe that I have made my general objection to that statement of the law repeatedly, but I

object to this particular instruction in that it does not state the law; that it reads into the law something that is not there; that Section 715 of Title 38 has no application to Section 694(a).

The Court: Under the construction the court has made of it, that instruction would be correct, would it not?

Mr. Hughes: That is true; this would be correct under the theory your Honor has taken. With all due respect, I wish to maintain my position and I wish to keep my record clear.

The Court: Yes. The record will show throughout your insistence upon this point, and that applies to all instructions given with respect to any of the counts that apply—to any of the counts except Count One, I take it?

Mr. Hughes: Yes, your Honor.

The Court: And it will be deemed made to every instruction insofar as it is applicable to any count of the indictment other than Count One.

Mr. Hughes: Yes, your Honor. Is it necessary for me [9] to renew this objection at any future time?

The Court: Is it stipulated that the objection will be deemed made after the jury has been instructed and before the jury has retired?

Mr. Fitting: So stipulated, your Honor.

The Court: And, as to all objections made to instructions during this discussion, will it be stipulated that the objection be deemed renewed, without restating it, after the jury has been instructed and before the jury has retired?

Mr. Hughes: I have always sought to do this thing——

The Court: Is that so stipulated?

Mr. Hughes: ——because I thought it was well to avoid any verbal display of argument in the presence of the jury at the time indicated.

The Court: You are entitled under the Rule now, of course, to have the jury excused after they have been instructed.

Mr. Hughes: Oh, yes; 30 provides they may be excused.

The Court: So that you may make those objections outside the hearing of the jury. But, as a matter of convenience, if counsel stipulate—and I understand you gentlemen have stipulated?

Mr. Hughes: We have stipulated that any objections that either of us make——

The Court: —that any objections that either of you [10] gentlemen make will be deemed repeated then.

(Continued discussion of instructions omitted from transcript.) [11]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of excerpts of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is

a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 5th day of April, A.D. 1949.

/s/ ALBERT H. BARGION,
Official Reporter.

[Endorsed]: Filed April 5, 1949.

[Endorsed]: No. 12226. United States Court of Appeals for the Ninth Circuit. Helen Young, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 15, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12226

HELEN YOUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

STATEMENT OF POINTS ON APPEAL

Comes Helen Young, Appellant, and sets forth, in accordance with Rule 19 (6) of the rules of this Court, her statement of the points upon which she intends to rely:

1. That none of the counts of the indictment upon which she was convicted sets forth an offense against the United States of America.

2. That each such count of such indictment upon which she was convicted seeks to charge an offense which is not denounced as a crime or offense against the United States by the laws of the land.

3. That the sections of the U. S. Codes relied upon by the Government in each of the counts of which Appellant was convicted are of insufficient clarity and certainty to make them punishable offenses against the United States of America.

4. That the Government, according to its Bill of Particulars herein, relies upon Secs. 694, 694a, 694d,

697 and 715, all of Title 38 U. S. Code. That Sec. 694 is a Civil section and deals with the eligibility of Veterans for loans, the general conditions of guarantees thereof, the definition of "honorable discharge," the nature of lending agencies, and certain general provisions.

That Sec. 694a deals with loans on residential properties and provides three conditions therefor, and that only the third such conditions appears to have application here. It reads:

"That the price paid or to be paid by the Veteran for such property, or cost of construction * * * does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator."

This also is a Civil section.

That Sec. 694d authorizes the Administrator to promulgate rules and regulations, but provides no criminal penalty for the breach thereof.

That Sec. 697 seeks to adopt certain other and older sections of Title 38, U.S.C., and that the only such section relied on by the Government is Sec. 715 thereof.

That Sec. 715 contains the penalty, if any there be. Sec. 715 provides a penalty for the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under Secs. 701-703, 704, 705, 706, 707-715, 716-721 of Title 38 U.S.C., but does

not provide any penalty for the preparation of any such document or the filing thereof in connection with claims under Secs. 694, 694a or 694d of Title 38, U.S.C.

5. That in the premises the Court prejudicially erred in giving the Jury Instruction 13-C, which reads as follows:

Instruction 13-C

Section 715 of Title 38 of the United States Code provides in part that:

“Any person who shall knowingly make or cause to be made * * * or in any wise procure the making or presentation of a false * * * certificate * * * concerning any claim for benefits * * *”

That said instruction was not a statement of the law, since Sec. 715 does not provide any penalty for filing or making, or procuring, or presenting a false certificate concerning claims for benefits under the Servicemen's Readjustment Act of 1944.

Respectfully submitted,

/s/ HAL HUGHES,

Attorney for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 19, 1949. Paul P. O'Brien, Clerk.

No. 12226

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HELEN YOUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

HAL HUGHES,

615 Broadway Arcade Building, Los Angeles 13,

Attorney for Appellant.



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No. 12226

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HELEN YOUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

(a) Jurisdiction.

1. This appeal is brought to test the validity of certain Federal Statutes, all in Title 38, U. S. C., namely, Sections 694, 694a, 694d, 697 and 715 thereof.

2. The Indictment, and particularly Counts Two [Tr. p. 5], Three [Tr. p. 6], Four [Tr. p. 8], Five [Tr. p. 9] and Six [Tr. p. 10], charge an alleged violation of the sections above cited. The Bill of Particulars [Tr. p. 11] shows that the Government relies upon these sections and these sections only as to the counts aforesaid. The Verdict [Tr. p. 14] shows that Appellant was acquitted on Count One, which is not here involved, and convicted on Counts Two to Six, inclusive.

It should appear clearly from the above, that this appeal lies definitely within the jurisdiction of this Honorable Court.

(b) Statement of the Case and Question.

The main question here involved is, whether or not the penal provisions of 38 U. S. C. 715 apply to Sections 694, 694a, and 694d of the same Code. This in turn involves the interpretation of Section 697, also of the same Code, which seeks to adopt certain other sections, including the penal provisions of Section 715 (*supra*).

Respondent claims that the penal provisions of Section 715 (*supra*) have application to any violation of the civil sections above mentioned, and particularly to Section 694a. [Tr. pp. 5-11.]

Appellant contends that they do not, and has asserted this contention through her Motion to Dismiss [Tr. p. 12], her Motion for Judgment of Acquittal at the close of Plaintiff's Case in Chief [Tr. pp. 23-26], her renewal of said motion at the close of all testimony [Tr. p. 27], and her objection to an instruction given by the Court and numbered "13-C." [Tr. pp. 27-30.] Such instruction reads as follows:

"INSTRUCTION 13-C.

"Section 715 of Title 38 of the United States Code provides, in part, that:

" 'Any person who shall knowingly make or cause to be made, * * * or in any wise procure the making or presentation of a false * * * certificate * * * concerning any claim for benefits * * *'

under the Servicemen's Readjustment Act of 1944 shall be guilty of an offense."

It will be readily seen that all such motions to dismiss, motions for judgment of acquittal and objection to in-

struction are directed at the same identical point, which may be succinctly stated as follows:

Appellant contends that no penal provisions whatever attach to any violation of those civil sections heretofore quoted, *i. e.*, Sections 694, 694a and 694d, all of Title 38, U. S. C. A., and that the law provides no penalty for the filing of any documents understating the price charged any veteran for the purchase of any real property, or the construction of any house purchased or constructed under the provisions of the above quoted sections.

Respondent, on the other hand, contends that the law does attach such penalty under such sections, to such filing of such papers.

(c) The Errors Upon Which Appellant Relies Are as Follows.

1. That the Court erred in denying Appellant's Motion to Dismiss the Indictment [Tr. pp. 12-14] and each and every count thereof.

2. That the Court erred in denying Appellant's Motion for a Judgment of Acquittal at close of Plaintiff's case. [Tr. pp. 23-26.]

3. That the Court erred in denying Appellant's Motion for a Judgment of Acquittal at close of all testimony. [Tr. p. 27.]

4. That the Court erred in giving Instruction 13-C, set out in full hereinabove at page 2 hereof.

As will be readily seen, Appellant makes but one legal contention, namely, that the acts attributed to Appellant in Counts One to Six of the Indictment [Tr. pp. 5-12] do not nor do any of them set forth an offense against the Government. This point is further urged in that no penal language is to be found in 38 U. S. C. 694, 694a or 694d, and that the penal provisions of 38 U. S. C. 715 have no application to the first named sections.

(d) Argument.

Count Two of the Indictment [Tr. p. 5] charges that on or about July 1, 1946, Appellant "did knowingly cause a false certificate to be made concerning a claim for benefits under the Servicemen's Readjustment Act of 1944 (38 U. S. C., Secs. 694, *et seq.*), in that (she) did inform * * * The Bank of America * * * that the amount to be paid by Lloyd Shearer, a Veteran * * * to purchase a lot and construct a house * * *, as to which a loan guarantee was being sought from the Government of the United States, was \$9671.00, being made up of \$1500.00 to purchase said lot, and \$8171.00 to construct such house, and did cause said bank to certify in a Home Loan Report presented to the United States Veterans' Administrator, that the amount to be paid by such Veteran to purchase such lot and to construct such house was \$9671.00, and did not exceed the reasonable value thereof of \$9700.00, as determined by a proper appraisal * * *, made by * * * an appraiser designated by the Administrator of Veterans' Affairs; whereas, as (Appellant) well knew and caused to be concealed from said bank and the Veterans' Administrator, (Appellant) had caused said Veteran to sign a contract to pay \$2200.00 for such lot and had caused said Veteran to sign a contract to pay cost plus 10%, with a minimum cost figure of \$8200.00 and a maximum cost figure of \$9000.00 for the construction of such house, and did demand of such Veteran the sum of \$9000.00 for such construction, or a total of \$11,200.00 for such house and lot."

Counts Three [Tr. p. 6], Four [Tr. p. 8], Five [Tr. p. 9] and Six [Tr. p. 10] are similar in every respect, excepting for the dates, amounts, and name of the Veteran.

The Code sections upon which the Government relies for its penalty may be summarized as follows [see Bill of Particulars, Tr. pp. 11-12]:

38 U. S. C. 694 is a section wholly civil in its nature, defining a Veteran within the scope of the Act, providing an automatic guarantee by the Government of certain portions of certain loans made to such Veterans, imposing certain conditions upon the making of such loans, including the length of amortization thereof, defining an honorable discharge, naming the lending agencies who may make such guaranteed loans, and making other general provisions.

The pertinent portions of 38 U. S. C. 694a are quoted in full hereafter:

“Any loan made to a Veteran under this subchapter, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home, or for the purpose of making repairs, alterations, or improvements in property owned by him and occupied as his home, is automatically guaranteed if made pursuant to the provisions of this subchapter, including the following:

* * * * *

(3) That the price paid or to be paid by the Veteran for such property, or for the cost of construction, repairs, or alterations, does not exceed the reasonable value thereof, as determined by a proper appraisal made by an appraiser designated by the Administrator.”

38 U. S. C. 694d provides that the Administrator may promulgate rules and regulations for the carrying out of the provisions of the subchapter, and that he may designate certain employees of his department to exercise certain of his functions.

Attention is called to the fact that no penalty appears in any of the foregoing sections, nor is any penalty provided for the violation of any rules made pursuant to Section 694d (*supra*).

38 U. S. C. 697 reads as follows:

"Sec. 697. Application of other laws; acceptance of uncompensated services; contracts with agencies or persons for service.

Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under sections 30a and 485 of Title 5 and sections 701-703, 704, 705, 707-715, and 716-721 of this title, and the provisions of sections 450, 451, 454a and 556a of this title, shall be for application under this chapter. For the purpose of carrying out any of the provisions of sections 30a and 485 of Title 5 and section 701-703, 704, 705, 706, 707-715, and 716-721 of this title, and this chapter, the Administrator shall have authority to accept uncompensated services, and to enter into contracts or agreements with private or public agencies, or persons, for necessary services, including personal services, as he may deem practicable. June 22, 1944, c. 268, Title VI, Sec. 1500, 58 Stat. 300."

The only section sought to be adopted by the last quoted or adoptive section which has any application herein is 38 U. S. C. 715, which reads as follows:

"715. False affidavit, declaration, voucher or writing. Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher or paper, or writing purporting to be such, concerning any claim for benefits under this title [Secs. 701 to

703, 704, 706, 707 to 715, 716 to 721 of this title], shall forfeit all rights, claims, and benefits under this title [such sections], and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000 or imprisonment for not more than one year, or both. (Mar. 20, 1933, c. 3, Title I, Sec. 15, 48 Stat. 11.)”

It will be readily seen that the only penalty contained in any of the sections relied on by the Government in its indictment [Tr. pp. 5-11], or its Bill of Particulars [Tr. pp. 11-12], is to be found in Section 715 (*supra*). In this connection it ought to be noted that Section 715 (*supra*) was passed March 20, 1933, and that all the other sections relied on by the Government were passed as parts of one Act, namely, World War II Servicemen's Readjustment Benefits, codified as Chapter 11c of Title 38, and commonly known as the “G. I. Bill of Rights,” which was not adopted until June 22, 1944, eleven years later for the penal clause relied on.

Appellant's Contention.

Appellant contends:

1. None of the counts in the indictment of which she was convicted state an offense against the Government.
2. That Congress has attached no penalty to Sections 694, 694a or 694d of Title 38, U. S. C.
3. That 38 U. S. C. 697, the adoptive section, adopts, if anything, the whole of 38 U. S. C. 715.
4. That 38 U. S. C. 715 does not, and by reason of the date of its passage could not, attach any penalty to any of the above-mentioned sections, but on the other hand, attaches a penalty only to those sections which are named within it.

Appellant further contends, and will show from the cases hereinafter cited:

1. That Congress not only must have an intent to denounce an act as a crime, but must express such intent in clear and unequivocal language.

2. That it is not the function of the courts to supply in any law that which Congress has omitted, even inadvertently.

The Government's Contention.

The Government's theory seems to be that 38 U. S. C. 694a, which is not a penal section, has been violated by the Appellant; that 38 U. S. C. 697, which is not a penal section adopts, among other things, 38 U. S. C. 715 which in turn contains a penalty, and that such penalty, although expressly applied only to the sections quoted in the body of 38 U. S. C. 715, nevertheless in some fashion can be applied to the failure of Appellant to comply with the original civil section, 38 U. S. C. 694a.

The rule-making section, 38 U. S. C. 694d, is not considered in the above analysis, since it provides no penalty for the violation of any rule which may be made pursuant to it. *Grimaud v. U. S.*, 220 U. S. 506, sets forth the formula which must be followed in order that the courts may punish the violation of a rule made by a non-legislative official. This formula is so familiar as to justify brief paraphrasing here. It is, in short, that Congress must declare a policy, the carrying out of which requires rules. It must then designate an office, the holder of which it empowers to make rules pursuant to Congress' declared policy. It must then provide a penalty for the violation of the rules so made. The latter step is absent in 38 U. S. C. 694d.

Congress Must Provide the Penalty.

As early as 1812 the Supreme Court in *U. S. v. Hudson & Goodwin*, 7 Cranch 32, 3 L. Ed. 257, announced that the only court established by the Constitution was itself, and that all other federal courts derive their authority and even their existence from acts of Congress. Accordingly, it is said in this classical decision, the courts may not enforce any law not passed by Congress nor may they, no matter how great the urgency, supply any defect in any law which Congress has passed.

This doctrine has been preserved intact by all the courts since its announcement, and has been frequently repeated and elaborated upon. Perhaps its most dramatic expression is to be found in *Viereck v. U. S.*, 318 U. S. 236, 87 L. Ed. 734, 63 S. Ct. 561. At the time of the decision of the *Viereck* case (1942) we were at war. The offense charged against Viereck was close to treason, in supporting the cause of our principal enemy, Germany. In that year our cause was going badly and our war far from won. Nevertheless, in the face of all these circumstances which might have constrained the Supreme Court to read into the Acts of Congress more than they contained, in support of our very national existence, the Supreme Court said, on page 241 of volume 318 U. S.:

“One may be subjected to punishment for a crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress.”

In the same decision at page 243, the Court said further:

“The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not other-

wise within its reach, however deserving of punishment his conduct may seem."

The last expression of the Supreme Court upon this subject, so far as the writer knows, is to be found in *U. S. v. Evans*, not yet in a bound volume but set out in S. Ct., L. Ed., Advance Opinions, Vol. 92, page 585, *et seq.* This opinion, which is dated March 15, 1948, is by Mr. Justice Rutledge, all members concurring. The charge against Evans was that of violating 8 U. S. C. 144, in that he did harbor aliens not lawfully entitled to enter or reside within the United States. The Code section reads:

"That any person * * * who shall bring into or land in the United States (or shall attempt to do so), or shall conceal or harbor, or assist or abet another to conceal or harbor in any place * * * any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the United States under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$2,000. and by imprisonment for a term not exceeding five years, *for each and every alien so landed or brought in or attempted to be brought in or landed.*" (Emphasis added.) 39 Stat. 874, 880, C. 29, 8 U. S. C. A. Sec. 144, 2 FAC title 8, Sec. 144.

It will be seen that although the above section denounces both the bringing in of unauthorized aliens and their harboring, its penalty clause contains the language: "For each and every alien so landed or brought in * * *." The evidence in the *Evans* case points to harboring and not to bringing in. Defendant contended that 8 U. S. C. 144 did not denounce the harboring of aliens, and pro-

vided no penalty for so doing. The following excerpts from the opinion are quoted, each showing the page from which it is taken:

“The case presents an unusual and difficult problem in statutory construction. It concerns not so much Congress’ intent to make concealing or harboring criminal, as it does the penalty to be applied to those offenses * * *” (p. 586).

Here the Supreme Court has as much as said that Congress has shown an attempt to make harboring a crime, but that the statute as well as the prosecution of Evans, must stand or fall on the clarity with which Congress has expressed itself:

“In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, nor judicial functions” (p. 587).

Thus it appears that the Supreme Court does not approve any judicial expansion of the legislative mandate.

“In other words, because Congress intended to authorize punishment, but failed to do so, probably as a result of oversight, we should plug the hole in the statute” (p. 588).

The above quotation is a statement of the Government’s position in the *Evans* case and, so we contend, in the instant case. In the former the Supreme Court refused to “plug the hole.” The decision ends with the following language:

“This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its functions, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law” (p. 592).

Indeed it would be better if Congress were to pass an intelligible act defining the purported offense herein sought to be prosecuted than for many defendants like these to be put to trial only to meet with reversal in the end.

Congress Did Not Intend to Define a Crime.

Had Congress believed that it had denounced any and all violations of any and all civil sections of the entire act by means of the adoptive Section 697 thereof, then it would not have had reason to place penal sections within the chapter. But 38 U. S. C. 696l is a penal section and 38 U. S. C. 696k is a quasi-penal section. Each is quoted hereafter :

“Sec. 696l. Penalties for false statements, misrepresentations, and unlawful acceptance of allowance.

(a) Whoever, for the purpose of causing an increase in any allowance authorized under this subchapter, or for the purpose of causing any allowance to be paid where none is authorized under this subchapter, shall make or cause to be made any false statement or representation as to any wages paid or received, or whoever makes or causes to be made any false statement, representation, affidavit, or document in connection with such claim, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

(b) Whoever shall obtain or receive any money, check, or allowance under this subchapter, without being entitled thereto and with intent to defraud the United States, shall be punished by a fine of not more than \$1,000 or by imprisonment for not more than one year, or both.”

“Sec. 696k. *Acceptance of unauthorized allowance.*

Any claimant who knowingly accepts an allowance to which he is not entitled shall be ineligible to receive any further allowance under this subchapter.”

38 U. S. C. 715 Applies Its Penalty Only to Veterans.

We respectfully urge that Section 715 (*supra*) which has been sought to be adopted, applies only to veterans and not to persons other than veterans who violate the several sections named within it. This is clear from a reading of the section itself, and particularly from the following excerpt therefrom:

“Any person who shall knowingly make * * * or in any wise procure the making * * * of any false or fraudulent affidavit concerning any claim for benefits under section 701 * * * shall forfeit all rights, claims, and benefits under such section * * *.”

Since none other than veterans have any rights or claims to forfeit under the quoted sections, we urge that Section 715 (*supra*) was directed by Congress against offenses committed by veterans and not against persons who dealt with veterans.

Conclusion.

We conclude therefore as follows:

(a) That this Honorable Court has jurisdiction of this appeal.

(b) That the court below erred in denying Appellant's Motion to Dismiss the indictment, as well as Appellant's two Motions for Judgment of Acquittal, and further erred in instructing the jury as shown in Instruction 13-C, quoted hereinabove.

(c) That Appellant has been convicted of violating a section which is purely civil in its nature.

(d) That Congress had no intent to denounce the acts of Appellant as set forth in the several counts of the indictment.

(e) That even though Congress had intended to denounce the acts attributed to Appellant, it has failed to do so.

(f) That the judgment appealed from should be reversed.

Respectfully submitted,

HAL HUGHES,

Attorney for Appellant.

No. 12226.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

HELEN YOUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

FILED
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No. 12226.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HELEN YOUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

Appellant was indicted under Sections 697 and 715 of Title 38 of the United States Code on October 6, 1948 [R. 5-11].¹ The District Court had jurisdiction of the cause under Section 3231 of Title 18 of the United States Code. The offenses charged were committed in Los Angeles County, within the Central Division of the Southern District of California.² Judgment was entered on Counts Two through Six of the Indictment, the counts involved in this appeal, on March 28, 1949 [R. 15-18]. Notice of Appeal was filed on March 29, 1949 [R. 18-20]. This Court has jurisdiction under Section 1291 of Title 28 of the United States Code.

¹References preceded by the letter "R" are to the printed record on appeal, and those preceded by "AB" are to Appellant's Opening Brief.

²The indictment so charged [R. 5-11], and no attack is made on the indictment on this ground.

Statement of the Case.

On October 6, 1948, the Federal Grand Jury at Los Angeles returned an Indictment against appellant Helen Young and another in six counts, which was filed that day in the United States District Court for the Southern District of California, Central Division [R. 2-11]. This appeal involves Helen Young only, and Counts Two through Six of the indictment only, there having been an acquittal as to the other defendant on all counts in which she was named, and an acquittal as to Helen Young on Count One [R. 14]. Each of Counts Two through Six of the Indictment charges Helen Young with knowingly causing a false certificate to be made concerning a claim for benefits under the Servicemen's Readjustment Act of 1944 (38 U. S. C. 694 *et seq.*) by furnishing a bank with false information as to the amount to be paid by a veteran to buy a lot and to build a house thereon, and by causing the bank to certify in a Home Loan Report presented to the United States Veterans Administration that the veteran was paying the false amount and that such amount did not exceed a proper appraisal made by an appraiser designated by the Administrator of Veterans Affairs, whereas, as appellant knew, such figures were false and the true amount did exceed such appraisal.

Appellant's motion to dismiss the indictment for failure to state facts sufficient to constitute an offense was denied on November 5, 1948 [R. 12-13], and appellant pleaded not guilty [R. 13-14]. At the trial, appellant moved for a judgment of acquittal at the end of the Government's case, on the ground, among others, that the Indictment did not charge an offense, which motion was denied [R. 23-26]. The motion was renewed, and again denied, at

the close of all the testimony [R. 27]. Appellant also objected to the instruction to the jury relating to Section 715 of Title 38, one of the statutes on which the Indictment was founded, but the instruction was given [R. 27-30]. Appellant was found guilty by a jury on March 3, 1949, on Counts Two through Six [R. 14].

On March 28, 1949, appellant was sentenced to imprisonment for one year and fined \$1000 on each of Counts Two through Six, execution thereof being suspended and appellant placed on probation for five years, the conditions of which were that appellant should make restitution of \$3200 to certain named veterans, pay a fine of \$2000, and comply with all laws and with the rules of the Probation Office [R. 15-18].

Statutes and Regulations Involved.

(a) PENAL STATUTES.

Section 1500(a) of the Servicemen's Readjustment Act of 1944—popularly known as the G. I. Bill of Rights—provides (38 U. S. C. 697(a)):

“Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under sections 30a and 485 of Title 5 and sections 701-703, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title, and the provisions of sections 450, 451, 454a and 556a of this title, shall be for application under this chapter.³ For the purpose of carry-

³The exact language of this sentence as enacted was (58 Stat. 300):

“Except as otherwise provided in this Act, the administrative, definitive, and penal provisions under Public, Numbered 2, Seventy-third Congress, as amended, and the provisions of Public, Numbered 262, Seventy-fourth Congress, as amended (38 U. S. C. 450, 451, 454a and 556a), shall be for application under this Act.”

ing out any of the provisions of sections 30a and 485 of Title 5 and sections 701-703, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title, and this chapter, the Administrator shall have authority to accept uncompensated services, and to enter into contracts or agreements with private or public agencies, or persons, for necessary services, including personal services, as he may deem practicable.”

Section 715 of Title 38 provides:⁴

“Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under sections 701-703, 704, 705, 706, 707-715, 716-721 of this title, and sections 30a, 485 of Title 5, shall forfeit all rights, claims, and benefits under such sections, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000 or imprisonment for not more than one year, or both.”

(b) OTHER STATUTORY PROVISIONS.

The provisions of the Servicemen's Readjustment Act of 1944 relating to loans to veterans for the purchase of real estate are in Title III of the Act (38 U. S. C.

⁴Enacted as Sec. 15 of Public, Numbered 2, Seventy-third Congress (48 Stat. 8, 11).

694, 694a-k; 58 Stat. 291-293, as amended by 59 Stat. 626-631). Under that Title, the United States, through the Administrator of Veterans Affairs, will guarantee, within certain limits, loans made to veterans of World War II for purchasing or constructing dwellings to be occupied as their homes. As to the requirements the loan must meet, Section 501 provides, in part (38 U. S. C. 694a):

“Any loan made to a veteran under this subchapter, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home or for the purpose of making repairs, alterations, or improvements in property owned by him and occupied as his home, is automatically guaranteed if made pursuant to the provisions of this subchapter, including the following:

. . .

“(3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator.”

Section 504 (38 U. S. C. 694d) gives the Administrator the power to promulgate necessary and appropriate rules and regulations for carrying out the provisions of the statute.

(c) REGULATIONS.

Regulations under the Servicemen's Readjustment Act of 1944 were promulgated by the Administrator (11 F. R. 2118-2126). Section 36:4336 of such regulations provides (11 F. R. 2124):

"No loan is guaranteeable or insurable the proceeds of which have been expended or will be expended for property, or for construction, alterations, repairs or improvements, the purchase price or cost of which is in excess of the reasonable value of the same as determined by a proper appraisal made by an appraiser designated by the Administrator."

And Section 36:4303(c) provides, in part (11 F. R. 2120):

"Evidence of automatic guaranty or of insurance will be issuable if the loan is reported to the Administrator within 30 days following full disbursement, and upon the certification of the lender that:

(i) The loan has been made in full accordance with the terms and provisions of the act."

Statement of Facts.

The present appeal involves no question of fact.

ARGUMENT.

I.

Introduction.

The sole question on appeal in this case is whether the indictment states an offense, appellant contending that Section 1500 (38 U. S. C. 697) of the Servicemen's Readjustment Act of 1944 is ineffective to make it a criminal offense to knowingly cause a false certificate to be made concerning a claim for benefits under the Act (A. B. 3, 7-8). Appellant contends that Section 1500 is ineffective to incorporate into the Servicemen's Readjustment Act by reference Section 715 of Title 38, and that there is no other penal provision in the Act.

The Government contends that Section 715 is validly incorporated into the Servicemen's Readjustment Act by inexpert but adequate language, and that the practical effect of Section 1500 is to amend Section 715 so that it prohibits the use of false papers "concerning any claim for benefits under the Servicemen's Readjustment Act of 1944."

Section 1500 provides (38 U. S. C. 697):

"Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under sections . . . 715 . . . of this title . . . shall be for application under this chapter . . ."

II.

Section 1500 (38 U. S. C. 697) Is a Valid Penal Statute.

1. District Court Decisions.

The only reported case squarely in point is *U. S. v. Oakland*, 81 F. S. 343 (W. D. La. 1948). Defendants there moved to dismiss an information brought under Section 697 of Title 38 that charged the defendant with falsely stating the purchase price of a home in an application for a Home Loan Guaranty. Defendant asserted that the information "does not set forth or allege the commissions of an offense against the United States . . . ," in that the statutes under which it was laid "are so vague and indefinite, fail to set forth a comprehensible, intelligent, definitely ascertainable standard of criminal responsibility" and are also unconstitutional under the 5th and 6th amendments. After quoting Section 715 of Title 38, Chief Judge Dawkins said (81 F. S. 344):

"Whatever may be said as to other offenses under the Act of June 22, 1944, a false statement of the character charged in the bill clearly falls under and only under the last quoted statute, which, in effect, is made part of the said World War II Veterans Act of June 22, 1944. It deals entirely with false statements or representations made to any agency or department of the Government in the prosecution of a claim for money, property, or other benefits. See *Panama Railroad Co. v. Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748, and also *United States v. Gilliland*, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598.

"It is not believed necessary to discuss at length the principles and jurisprudence on the question of the adoption of provisions of earlier statutes by sub-

sequent acts of Congress. It suffices to say that I believe there can be no confusion or doubt about the applicability of the law in the manner stated in the present case.”

In this circuit, Judge Yankwich had the same problem before him in *U. S. v. Selph*, 82 F. S. 56, 58 (S. D. Calif., Jan. 27, 1949). That case also involved a motion to dismiss an indictment charging the making of a false statement under these statutes. In his written opinion, Judge Yankwich stated briefly (82 F. S. 56, 58):

“Section 715 of Title 38 U. S. C. A., punishes both him who knowingly makes or *causes* to be made, and him *who aids or assists in*, or procures the making or presentation of, the false or fraudulent statement or writing denounced. Section 697 of Title 38 makes the section applicable to claims under the Servicemen’s Readjustment Act of 1944, 38 U. S. C. A. §697.”

In oral remarks supplementing this written opinion, Judge Yankwich said, in part [Rep. Tr. Jan. 27, 1949, p. 10):

“However, the Congress may constitutionally adopt sections contained in other acts, and may in one penal statute make applicable to an event which occurs at a later date the penalties of the pre-existing statute, and I think that Sec. 697, although inexpertly drawn, achieves this purpose. The section says:

“‘Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under Sections 30a and 485 of Title 5, and Sections . . . 712-715 of this title, . . . shall be for application under this chapter.’”

“What they say, in rather an awkward way, is that they shall apply under this chapter, and it is quite evident that they intend to apply, all the administrative rights and remedies and definitions, and they use definitive in the sense of final. They specifically designate penal provisions, and I believe if they had left out penal provisions in the chapter, they would have brought all the chapter into play.

“By referring to Sections 712-714, I believe it leaves no room for doubt that what they intended to do was to apply these sections to instruments to be prepared under the Veterans Act, so as to apply the pre-existing statute to the new situation which has arisen by reason of the passage of the Veterans Act.”

The same ruling has been made in each case in which the question has been raised in the Southern District of California.¹

The valid incorporation by Section 697 of Title 38 of non-penal provisions of the statutes enumerated therein has apparently been assumed without question in *Slocumb v. Gray*, 82 F. S. 125, 126 (Dist. of Col. 1949), and *International Union v. Bradley*, 75 F. S. 394, 396 (Dist. of Col. 1948).

¹*United States v. Theodore*, No. 19981, 9/24/48, Judge Peirson M. Hall.

United States v. Selph, No. 20023, 9/24/48, Judge Peirson M. Hall.

United States v. Branum, No. 20337, 11/8/48, Judge Peirson M. Hall.

United States v. Karrell, No. 20365, 1/14, 18/49, Judge Wm. C. Mathes. [See Rep. Tr. pp. 388-404, 431, 507-8, 519.] This case is presently before this court on appeal as *Karrell v. United States*, No. 12199.

United States v. Selph, No. 20657, 6/6/49, Judge Jacob Weinberger.

2. The Congressional Intent Was to Incorporate Such Penal Statutes.

A reading of the legislative history of the Servicemen's Readjustment Act of 1944 demonstrates the Congressional intent to integrate that Act with the existing Federal legislation on veterans' benefits in order to provide for a uniform system of administration and sanctions. An explanation of the purpose of Section 1500 is found in Senate Report No. 755, 78th Congress, 2nd Session (Senate Report 78-2, Volume 3-59), wherein it is stated:

"Section 1600¹ makes applicable to all the titles of the act, except as otherwise provided therein, the administrative, definitive, or penal provisions of Public Law 2, Seventy-third Congress. This integrates the entire act with the system of benefits initiated under and authorized by said Public Law 2, act of March 20, 1933, and the Veterans Regulations issued thereunder as subsequently amended by statutory enactment. Among other things it makes applicable the definition of the term 'person who served' as including any person, male or female, commissioned, enlisted, enrolled, or drafted, who served in any of the armed forces of the United States, including the Army, Navy, Marine Corps, Coast Guard, or any of the components thereof. Likewise it will make applicable the provisions of section 5, Public Law 2, concerning the finality of decisions of the Administrator, except as otherwise provided, but it would not carry forfeiture for fraud under title V inasmuch as the penalties for fraud under said title are specifically provided in section 1400."²

¹Now Section 1500 (38 U. S. C. 697).

²Now Section 1301 (38 U. S. C. 696l).

This shows clearly that the Congressional intent was to carry over into the Servicemen's Readjustment Act both the administrative and penal provisions of Public Law 2.

3. The Authorities on Incorporation by Reference Support the Above Rulings of the District Courts.

At the outset it should be noted that Section 715, standing by itself, states a crime definitely enough. In essence it states a crime similar to that outlined in Section 80 of Title 18 (1946 Ed.), but limits the crime to false statements concerning certain claims for benefits. This is a sufficient delineation of a crime, and the statute is not invalid because of indefiniteness. *Cf. U. S. v. Gilliland*, 312 U. S. 86, 91 (1941).

It is the Government's contention that Section 715 is incorporated into the Servicemen's Readjustment Act, and that in practical effect this incorporation makes Section 715 read "concerning any claim for benefits under the Servicemen's Readjustment Act of 1944." It would have been better had Congress so expressly amended the statute, but the method followed sets forth a crime with sufficient definiteness.

(a) INCORPORATION BY REFERENCE GENERALLY.

Incorporation by reference is a not uncommon practice in federal legislation. The Supreme Court early stated in *Kendall v. United States*, 12 Pet. (37 U. S.) 524, 625 (1838):

"It was not an uncommon course of legislation in the states, at an early day, to adopt, by reference, British statutes; and this has been the course of legislation by congress in many instances where state practice and state process has been adopted."

See, also, Chief Justice Marshall in *Gibbons v. Ogden*, 22 U. S. (9 Wheat) 1, 207-208 (1824). In many states constitutional provisions now prohibit these legislative shortcuts, but there is no such federal prohibition. Hence, there can be no objection to incorporation by reference, as such.

(b) INCORPORATING A LIMITED STATUTE.

One difficulty raised in the present case is that Section 715 is limited on its face to claims for benefits under specific statutes, and this enumeration does not include the Servicemen's Readjustment Act of 1944, which was enacted eleven years after Section 715. However, the clear intent of Congress was to make Section 715 applicable to the Servicemen's Readjustment Act.

In *Alton Railroad Co. v. United States*, 315 U. S. 15, 18-20 (1942), question was raised of the rights of certain railroads to bring suit to set aside the granting of a certificate of convenience and necessity as a common carrier by motor vehicle to one Fleming. The court stated (315 U. S. 19):

" . . . They rest their right to sue on §205(h) of the Motor Carrier Act (49 U. S. C. Supp. §305(h) which provides that 'Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I . . . ' Sec. 1(20) of Part I (49 U. S. C. §1(20) authorizes 'any party in interest' to sue to enjoin any construction, operation or abandonment of a railroad made contrary to §1(18) or (19). Such suits may be maintained not only where the railroad proceeds without authorization of the Commission, but

also where it proceeds under a certificate of the Commission whose validity is challenged. *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382. Hence, we conclude that §205(h) has incorporated by reference the 'party in interest' provision of §1(20)"

It is to be noted that Section 1(20) of Part I, which was incorporated into the Motor Carrier Act, applied on its face only to suits concerning railroads. See, also, *Panama Railroad Co. v. Johnson*, 264 U. S. 375, 391-392 (1924), and *Engel v. Davenport*, 271 U. S. 33, 38-39 (1926), arising under the Merchant Marine Act of 1920, which provided:

"That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable"

A somewhat similar case is *The Brazil*, 134 F. 2d 929 (C. C. A. 7, 1943). A libel for forfeiture of a vessel because of sale to an alien was brought under Section 836 of Title 46 (Shipping), which provided that forfeitures "may be disposed of in the same manner, as forfeitures incurred for offenses against the law relating to

the collection of duties.” The Customs Act (Section 1621 of Title 19, Customs Duties) provided that “No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs law . . .” shall be instituted except within five years of discovery of the offense. The court applied these provisions of the Customs Act, finding that to be the clear intent of Congress. It should be noted that the statute thus incorporated was limited on its face to “forfeiture of property accruing under the customs law,” and that the statute incorporating it did so generally, and not by specific citation. A similar result was reached in this Circuit with little discussion in *The Tahoma*, 87 F. 2d 349, 354 (C. C. A. 9, 1936) involving substantially the same statutes, in reliance on a series of prior decisions in the First Circuit.

(c) INCORPORATING CRIMINAL STATUTES.

While it is true that the cases cited above deal with statutes which are not criminal, criminal statutes have been incorporated by reference. The most extreme example is the Assimilative Crimes Act (18 U. S. C. 13). That statute makes criminal any act or omission committed in certain places within the special jurisdiction of the United States, if such act or omission is a crime by the law of the state in which such place is situated, although such act or omission is not made a crime by Congressional enactment. This statute thus incorporates into federal law state statutes generally, without specifying them by any citation whatever. See, also, Section 1114 of Title 18, which, though in language only incorporating the punishment imposed in Sections 1111 and 1112 of Title 18, in fact must incorporate most of their substantive provisions so that the punishment can be fixed.

The constitutionality of the Assimilative Crimes Act has long been settled by *Franklin v. United States*, 216 U. S. 559, 568-570 (1910). That statute raises many problems not present under Section 697. Under the Assimilative Crimes Act, not only must state law be consulted to see if a crime has been committed, but a very difficult question sometimes arises as to whether a federal criminal statute precluded prosecution under the State statute defining a slightly different crime. *Cf. Williams v. United States*, 327 U. S. 711 (1946). The time of enactment or amendment of the state statutes is always important, in that only those state statutes are imported into federal law that were in existence when the Assimilative Crimes Act, or its latest amendment, was passed. *United States v. Paul*, 6 Pet. (31 U. S.) 141 (1932). See, also Frankfurter, dissenting, in *Johnson v. Yellow Cab Co.*, 321 U. S. 383, 398-399 (1944). No such problem is presented here, because Section 715 was in the Code when 697 was enacted, and has not been amended since.

A guide to the degree of vagueness permissible in criminal statutes incorporating other statutes is furnished by *United States v. Stafoff*, 260 U. S. 477, 479-480 (1923). A prior decision of the Supreme Court had held that certain criminal provisions relating to the making of alcoholic beverages in violation of Internal Revenue requirements had been repealed by the National Prohibition Act. Congress thereupon passed an Act supplemental to the National Prohibition Act providing that "all laws in regard to the manufacture and taxation of and traffic in intoxicat-

ing liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provisions of the National Prohibition Act or of this Act.” In discussing this new statute, Mr. Justice Holmes said (260 U. S. 480) :

“But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms. The form of words is not material when Congress manifests its will that certain rules shall govern henceforth. *Swigart v. Baker*, 229 U. S. 187, 198 . . .”

It should be noted that this Supplemental Act referred vaguely to a body of statute law, without identifying the specific statutes involved, and further, that once such statutes should be identified, there would be the further question of whether they were directly in conflict with the National Prohibition Act or the Supplemental Act itself. This lack of specific identification should be contrasted with the direct citation of the statutes incorporated in the present case. It is true that the words of incorporation—“shall be for application”—could be improved upon, but the will of Congress is manifest, and the form of words is hence not material. Hence, it is a criminal offense under Sections 697 and 715 of Title 38 to knowingly cause a false certificate to be made concerning a claim for benefits under the Servicemen’s Readjustment Act of 1944.

III.

The Other Points Raised by Appellant Are Not Valid.

Appellant raises two additional points as to the sufficiency of the indictment under the statute. She says that the penalty of Section 715 of Title 38 applies only to veterans (A. B. 13), and that the presence of a specific penal section in another part of the Servicemen's Readjustment Act shows that Congress meant no criminal penalties under the loan provisions (A. B. 12).

As to the first, appellant cites Section 715, which provides that "any person" who does certain acts "shall forfeit all rights, claims, and benefits under such sections, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000 or imprisonment for not more than one year, or both." Appellant argues that the forfeiture of rights clause shows that Section 715 applies only to veterans. But, Section 715 says "any person"—not "any veteran" or "any person eligible to benefits under the act." The crime defined in Section 715 quite obviously is one which a non-veteran is capable of committing. The forfeiture of rights is a common clause, but it does not require, in the face of the broad "any person" language, that a person have rights to violate the statute.

The fact that there is an express penal clause (Sec. 1301, 38 U. S. C. 6961) in Title V of the Servicemen's Readjustment Act, dealing with Employment Readjustment Allowances, and no special penal clause in Title III, dealing with loans, does not mean, as appellant argues, that Congress meant to impose no criminal penalties

as to loans. Section 1500 is in Title VI of the original act, and that title, the last one of the act, begins as follows (58 Stat. 300):

“TITLE VI.

CHAPTER XV.—GENERAL ADMINISTRATIVE AND
PENAL PROVISIONS.

Sec. 1500. Except as otherwise provided in this
Act . . .”

The final title is the logical position for a general penal provision applying to the entire Act, and that is where Section 1500 was put.

The true explanation for Section 1301 (38 U. S. C. 696*l*) is that, in connection with Employment Readjustment Allowance under Title V, the veteran was to deal directly with the local State agency instead of the Federal Government. The question might arise as to whether a false statement made to a State agency would constitute a criminal offense under Section 715, even though the Federal Government reimbursed the State agency for the funds it disbursed. To obviate this possible technical objection, Congress provided a specific criminal penalty for false representations in connection with claims for allowances under Title V. It must be borne in mind that in writing Title V Congress was attempting to coordinate this title with existing State legislation relating to unemployment compensation. See also, the last sentence of the excerpt quoted at page 11 above from Senate Report No. 755. Thus, appellant's argument as to this section is without merit.

Conclusion.

The Indictment in this case charges an offense against the United States, and Section 1500 of the Servicemen's Readjustment Act of 1944 (38 U. S. C. 697) and Section 715 of Title 38 are adequate to define a criminal offense. The Government, therefore, respectfully urges that the judgment of conviction be affirmed.

Respectfully submitted,

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No. 12226.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HELEN YOUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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No. 12226.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

HELEN YOUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

Comes Helen Young, Appellant herein, and respectfully petitions the above entitled Court to rehear her appeal herein.

Principal Point of Appeal Undetermined.

Appellant urges this Honorable Court that the principal point urged by her in her appeal herein was not determined by the opinion of this Court rendered November 14, 1949. Such opinion turned principally upon the validity of the practice of incorporation by reference. On page 3 of such opinion, after stating that Appellant insisted that Congress has failed to denounce the acts charged in the indictment as crimes, the Court states:

“The incorporation of statutes by reference has been a common practice in Federal legislation, and the adoption of an earlier statute by reference makes it as much a part of the latter statute as though it had been incorporated at full length.”

Not only in her briefs heretofore filed, but in her oral argument, Appellant sought to make clear that she had no quarrel with the practice of incorporation of statutes by reference. What she did urge was that, taking the statutes relied upon by the Government at their face value, they did not denounce the acts attributed to her in the indictment as crimes.

The Penal Section Denounces Other Acts Than Those Charged.

Section 715 of Title 38, U. S. C. A., is specific in the acts it denounces. In so far as it is pertinent, it reads as follows:

“Any person who shall knowingly make or cause to be made, or conspire, aid, or assist in, agree to, arrange for, or in any wise plan the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claims for benefits under sections * * * of this act, shall be guilty of a misdemeanor * * *.”

Sections 694a and 697 of Title 38, U. S. C. A. are not mentioned in Section 715. They could not have been so mentioned in such section since at the time of the enactment of Section 715, *supra*, in its present form, the so-called G. I. Bill of Rights containing 694a and 697 of Title 38, U. S. C. A., had not yet been passed.

Since Section 715, *supra*, has reference to the filing of papers claiming benefits under certain specific sections named therein, and since the benefits sought in the instant case were under Section 694a of said title which is not named therein, Congress has, whatever its intent, failed to denounce the acts attributed to Appellant.

Congress Must Not Only Have an Intent, but Must Express It.

In our earlier Briefs, we have referred extensively to *U. S. v. Evans*, Advance Opinion citation, Vol. 92, p. 585, In that case Congress's intent to denounce the harboring of aliens illegally entered into the United States was much more plainly expressed, we urge, than is its intent to denounce the acts herein attributed to Defendant.

In the *Evans* case, however, the Supreme Court made it clear that mere Congressional intent was not enough, unless the same be plainly stated.

We quote from page 589:

"We are not willing to undertake extension of the penalty provision blindfold, without knowing in advance to what acts the penalties may be applied. Nor are we any more willing to decide wholesale among the various possibilities of coverage. That problem, squarely presented in concrete instances, might be resolved step by step, were there no difficulty over the penalty. But to resolve it broadside now for all cases the section may cover, on this indirect presentation, would be to proceed in an essentially legislative manner for the definition and specification of the criminal acts, in order to make a judicial determination of the scope and character of the penalty."

The Government contended in the *Evans* case that "* * * because Congress intended to authorize punishment, but failed to do so, probably as a result of oversight, we (the Court) shall plug the hole in the statute." (P. 588.) This in the *Evans* case the Court refused to do. Our contention is that it should likewise refuse to torture the language of the statutes in the instant case.

Conclusion.

We urge, therefore, that the Court rehear the above entitled case and reverse the judgment of the District Court rendered therein, in that the law relied on by Appellee does not make the acts attributed to the Appellant in the indictment an offense against the Government.

Respectfully submitted,

HAL HUGHES,

Attorney for Appellant.

Certificate.

The undersigned, Hal Hughes, attorney of Appellant, Certifies that in his judgment this Petition for Rehearing is well founded and that the same is not interposed for delay.

Dated, the 12th day of December, 1949.

HAL HUGHES.

